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**UNFAIR CONTRACT TERMS UNDER THE
KUWAITI CIVIL CODE -A CRITICAL
ANALYSIS AND SUGGESTIONS FOR REFORM**

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A thesis submitted in fulfilment of the requirements for the
degree of Ph.D. in Law

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Abstract

The fundamental aim of this doctoral thesis is to appraise the protection model critically against unfair contract terms in Kuwait and propose solutions for its reform. The thesis examines the Kuwaiti Civil Code (KCC) provisions that regulate unfair terms in the context of the standard form of contracts (i.e., adhesion) and relevant case law. It primarily seeks to address two main issues: (i) why the Kuwaiti control model for the protection against unfair terms has failed and (ii) how it can be reformed.

It argues that the existing control model has failed considerably in providing adhering parties with an adequate level of protection for two reasons. First, the regulation of unfair terms in the context of adhesion contracts is fraught with ambiguities and legal lacunae that render it flawed and ineffective. Second, the courts' restrictive interpretation of what constitutes an adhesion has limited the protection to only a few types of contracts.

The thesis explores how the protection model can be overhauled and, where relevant, uses European Union Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts as a normative framework to offer proposals for law reform.

To achieve this end, the thesis is divided into an introduction, five chapters, and a conclusion. It starts with a brief introduction, focusing mainly on the statement of the problem, motivation for the research, research objectives and methodology. Chapter one seeks to explore whether, in the light of the statutory deficiency, the general principles of contract law can be employed to counter unfair terms. The aim is to confirm the main hypothesis of the thesis and explain why legislative intervention is needed. Chapter two deals with the scope of protection and discusses the notion of adhesion contracts, their regulation in the KCC and how they have been interpreted by the courts. Chapter three explores the connotations of the concept of unfair terms and seeks to determine whether the ambiguous concept of contractual unfairness can be explained with reference to the theory of abuse of rights. Chapter four assesses the court's role in disputes involving unfair

terms. Chapter five highlights the need to introduce a parallel enforcement mechanism and suggests the establishment of a public body entrusted with the task of eliminating unfair terms from the market. The final segment of the study presents concluding remarks and suggests recommendations for law reform.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature: _____

Printed Name: Sami Al-Anzy

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Abbreviations

AGB-Gesetz	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
ALQ	Arab Law Quarterly
AmJCompL	American Journal of Comparative Law
Anglo-AmLR	Anglo-American Law Review
BGB	Bürgerliches Gesetzbuch [German Civil Code]
BGH	Bundesgerichtshof [German Federal Supreme Court]
Calif L Rev	California Law Review
CambLJ	Cambridge Law Journal
CBLJ	Canadian Business Law Journal
CIL	Contemporary Issues in Law
CLP	Current Legal Problems
CML Rev	Common Market Law Review
ColumLRev	Columbia Law Review
D Chron	Recueil Dalloz-Sirey: Chronique
ECJ	European Court of Justice
ELER	Erasmus Law and Economics Review
Emory Int'l LRev	Emory International Law Review
ERPL	European Review of Private Law
EU	European Union
EuropConsumer LJ	European Consumer Law Journal
Gaz Pal	La Gazette du Palais
HarvLRev	Harvard Law Review
ICLQ	The International and Comparative Law Quarterly
IndLJ	Indiana Law Journal
JCP	Journal of Consumer Policy
Jour Sec L	Journal of Security and Law
JouroL	Journal of Law
KCC	Kuwaiti Civil Code
LaLRev	Louisiana Law Review
Law Gaz	Lawyer Gazette
LS	Legal Studies
Mcgill LJ	McGill Law Journal

MLR	Modern Law Review
MTC	Mobile Telecommunications Company
Murdoch U Elec JL	Murdoch University Electronic Journal of Law
OFT	[UK] Office of Fair Trade
OJLS	Oxford Journal of Legal Studies
RIDC	Revue Internationale de Droit Comparé
Seton Hall LegisJ	Seton Hall Legislative Journal
TulLRev	Tulane Law Review
UChiLRev	University of Chicago Law Review
UCTA	Unfair Contract Terms Act, 1977
UK	United Kingdom
UNIDROIT	Institut international pour l'unification du droit privé [International Institute for the Unification of Private Law]
UPittLRev	University of Pittsburgh Law Review
US	United States
UTCCR	Unfair Terms in Consumer Contracts Regulations
Willamette LRev	Willamette Law Review
WTO	World Trade Organization
Yale LJ	Yale Law Journal
Z Eu P	Zeitschrift für europäisches Privatrecht

Glossary

the Directive	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29
the traditional theory	judicial and jurisprudential theory of adhesion contracts

Introduction

The phenomenon of standard contracts and unfair terms has attracted the attention of legislators, courts and scholars since the beginning of the twentieth century. Many jurisdictions recognized the need to interfere in contractual relationships to protect the weaker party and rebalance the contract in that party's favour. The 1970s in particular witnessed an influx of legislative initiatives, primarily in Europe, to regulate and control unfair terms in standard consumer contracts.¹ In recognition of the seriousness of the problem, the Kuwaiti legislator, too, sought to regulate unfair terms in the context of adhesion contracts in articles 80–81 of the Kuwaiti Civil Code (KCC).² However, it is the author's view that the regulatory approach is far from satisfactory, and requires urgent and drastic reform. Therefore, the purpose of this research is primarily to investigate why the Kuwaiti regulatory framework failed to provide an adequate level of protection against unfair terms, and what statutory overhaul is required to correct the ineffectiveness and inadequacy of the law.

1. Statement of the problem

The proliferation of unfair terms in the Kuwaiti market can be ascribed to the prevalence of adhesion contracts as a contracting paradigm. This kind of contract contains standardized terms pre-drafted and offered by big businesses supplying goods or services to any potential consumer in the general public. The distinctive feature of this type of contract is the dominance of the business party in the contracting process and his refusal to negotiate the terms of his offer, which is presented on a take-it-or-leave-it basis. Since individual

¹ In Germany *Gesetz zur Regelung des Rechts der Allgemeiner Geschäftsbedingungen (AGB-Gesetz)* of 19 December 1976; in the UK *The Unfair Contract Terms Act 1977 (UCTA)*; in France *Loi n° 78-23 du 10 Janvier 1978 (loi Scrivener)*.

² Law No. 67/1980 published in the official gazette Kuwait Today vol. 1335 on 5 January 1981 and entered into force 25 February 1981.

members of the public who wish to deal with the business lack the power to influence the terms of the contract as proposed by the business, they have no choice but to accept them. It goes without saying that this contracting model leaves substantial room for abuse by businesses if the law does not offer a mechanism to counterbalance the powerful position of the proffering party. Therefore, the dominant position of the business allows it to insert unfair terms in these standardized contracts to its advantage in order to enhance its contractual position at the expense of the weak party.

So, how has the KCC responded to this problem? It should be pointed out first that the drafters of the code in their regulation of the concept of *adhesion contracts* sought to achieve two goals. The first was to assert the contractual nature of adhesion contracts in order to avoid any possible dispute about this fact. The wording of Art. 80 leads to this conclusion as it emphasizes that the dominance of the will of one party and absence of negotiations do not prevent the formation of the contract. This position is reiterated in the Explanatory Notes to the Civil Code, which state that even though the adhering party submits to the drafting party's will, his consent still exists and is sufficient for the formation of the contract.

The second goal is to protect the weaker party against unfair terms that the offeror may insert in the contract. The fact that the adhesion contract is a product of a unilateral will may induce the offeror to act opportunistically and insert terms favourable to him. Absence of negotiations, coupled with the unfamiliarity of most adhering parties with the complex legal terminology, makes it too easy for the offeror to succumb to the temptation of imposing unfair terms. For this reason, Art. 81 of KCC gives the court the power to protect the interests of the weaker party and intervene in the contractual relationship to remedy the unbalanced contract by amending the unfair terms or eliminating them altogether from the contract.

However, this regulatory approach has not been very successful in controlling unfair terms due to procedural and substantive problems inherent in it.

As for the procedural aspect of the problem, the adopted approach does not take into account the weak contractual position of the adhering party prior to the formation of the contract. The existence and sufficiency of the adhering party's consent to the formation of the contract from a legal point of view do not necessarily mean that his consent is always obtained freely in real life. If the contract includes unfair terms and is presented to the adhering party on a take-it-or-leave-it basis, then questioning the validity of his consent seems legitimate. It is unfortunate that the code does not address this point. From the researcher's perspective, the effects of this problem can be mitigated through enhancing the consent of the adhering party before the contract is concluded. This can be achieved by introducing the duty to inform on the part of the offeror and require him to disclose all information relating to the good or service supplied, and by making the terms more transparent to avoid abuse of language. Additionally, the law should recognize the right of withdrawal and allow the adhering party to walk away from the contract within a reasonable period.³

On the substantive aspect of the problem, the code does not provide a definition of what might constitute an unfair term or when a contractual term becomes unfair.⁴ It seems that the logic behind this omission is that the drafters of the code did not want to give the notion of contractual unfairness a narrow meaning and preferred to leave the courts ample room to deliver justice according to the merits of each individual case. However, the case law shows that Kuwaiti courts have not attempted even in one case to clarify the meaning of the concept *unfair terms*. In fact, an examination of the courts' treatment of adhesion contracts reveals that they have limited the scope of protection, thus depriving most adhering parties of the protection they deserve. In the course of their interpretation of the concept *adhesion contract*, the Kuwaiti courts introduced additional conditions that must be satisfied in order for any contract to be admitted as an adhesion contract. So, if an

³ See below at sections 2.3.4.1, 2.34.2, and 2.3.4.3

⁴ On the definition of unfair terms see chapter three.

adhering party wants to invoke protection against unfair terms, he must first show that the contract falls under the umbrella of this narrow definition. This restrictive, or rather deformed, interpretation of the legal text narrowed the scope of adhesion contracts and led to the limitation of the protection against unfair terms to a very specific group of contract, namely utility contracts, such as electricity, telephone and transportation.

Besides these procedural and substantive problems relating to the formation of the adhesion contract and the definition of *unfair terms*, the remedies set out in the code and the process through which they are sought are ineffective and call for reconsideration. The code provides amendment and elimination as two possible remedies against unfair terms which application falls within the sole discretion of the trial court. However, in order for the adhering party to enjoy protection, he must expressly request the court to intervene to rebalance the contract. This approach is not consistent with the modern legislative trends where the law not only allows, but also sometimes requires, the court to raise the unfairness issue on its own motion.⁵ This is because the ordinary adhering party out of ignorance or lack of legal knowledge might not be able to raise the unfairness issue or legally articulate his argument. Therefore, since the main function of the courts is to deliver justice, they should be empowered to play a more active role and examine the unfair terms of their own accord. Additionally, the remedy of amendment should be re-evaluated because it does not serve a dissuasive function and may actually encourage businesses to continue to insert unfair terms in their contracts as the original terms might ultimately be preserved by the court.

A final drawback in the Kuwaiti regulatory approach to unfair terms is that it does not provide an active mechanism that seeks to prevent the continued use of unfair terms in the market. The enforcement mechanism prescribed by the KCC is characterized by its dependence on individual litigation. The adhering party has to initiate legal proceedings

⁵ See the European Court of Justice (hereinafter 'ECJ') interpretations of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (the Directive) in *Cofidis*, *Mostaza Claro*, and *Pannon* cases, discussed in chapter four.

against the offeror in order challenge the unfair terms. The cost, length and complexity of the judicial procedure discourage the vast majority of adhering parties from seeking legal redress. This course, besides being cumbersome for the individual consumer, does not fulfil a preventative function because the effects of the judgment is limited to the parties to the dispute. Therefore, it is necessary to consider whether a parallel enforcement mechanism should be implemented. This work proposes the establishment of a public law enforcement mechanism whereby a governmental body assumes the responsibility for clearing the market of unfair terms, and is authorized to monitor the market on behalf of consumers and actively seeks to prohibit the continued use of such terms.

2. Motivation for the research

The driving motivation for this thesis is to enhance the adhering party's (the consumer) position vis-à-vis the offeror (the professional). There is an urgent need to revise the legal rules regulating unfair terms to redress the contractual balance in favour of the weaker party. It is only theoretically that the consumer possesses freedom of contract but in reality he is unable to bargain or improve his position. Because of the superiority of the offeror's position, the freedom to contract has become a unilateral privilege and, more or less, a license to abuse the weakness of the consumer by imposing unfair terms.⁶ Therefore, the deficiency of the statutory rules in offering an adequate level of protection for the weaker party should be highlighted and solutions to address this deficiency should be proposed.

3. Research objectives and methodology

The purpose of the research presented in this thesis is to assess two main and interrelated questions: the first is to find out to what extent the control system of unfair terms in the

⁶ See below for further discussion at section 2.2.

KCC has failed in providing protection against unfair terms, and the second is how it can be reformed. More specifically, this work seeks to achieve the following:

- i. To present a critical assessment of the statutory provisions relating to adhesion contracts and unfair terms in order to identify weaknesses, gaps, ambiguities and inconsistencies.
- ii. To examine and challenge the prevalent doctrinal and judicial interpretations of the notions of adhesion contracts and unfair terms in order to unravel factors and reasons that are responsible for making the law deficient in countering unfair terms.
- iii. To discover and understand how the problem of unfair terms has been dealt with in other jurisdictions.
- iv. To make recommendations for the improvement of the control of unfair terms in three main areas. First, the development of a definition and general standard of contractual unfairness; second, a reconsideration of the judicial enforcement of unfair terms; and third, the establishment of an active administrative mechanism for the elimination of unfair terms from the market.

The methodology adopted in this thesis is refers mainly to black letter law, drawing on theoretical and doctrinal scholarly debate. At the theoretical level, the thesis reviews the problems of the law and the philosophy for protection against unfair terms. At the doctrinal level, it discusses the predominant scholarly and judicial interpretations of adhesion contracts and unfair terms. Therefore, the inquiry involves exposition and critical evaluation of the content of the statutory provisions of the Kuwaiti Civil Code, in particular articles 80 and 81 and their interpretation and application by the courts. In addition, it examines academic research relevant to the issue.

The thesis refers to comparative law, specifically Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (hereinafter 'the Directive') and the law in some EU Member States to learn how this common problem has been approached and resolved in other jurisdictions. The examination of the Kuwaiti law in the light of more advanced legal systems assisted the researcher in gaining a better understanding of the problem in order to identify the shortcomings in the Kuwaiti law and formulate reform proposals. Therefore, the purpose of this work is not to compare the Kuwaiti law with its EU counterpart, but rather to use the EU regulation as a framework to improve understanding of the problem, and to formulate suggestions and develop recommendations for law reform.⁷ However, there will be occasional limited comparative discussion primarily to acquire more knowledge about the nature of the problem and the approach adopted in the Kuwaiti law.

4. Practical implication of the research

The regulation of unfair contract terms has not been subject to serious scrutiny since the inception of the KCC in 1980. The law has been in force for some 34 years and it has become necessary to analyse the effectiveness of the control model of unfair terms in practice. The lack of legal research in this field highlights the importance of this study as being the first doctoral thesis to offer a systematic investigation into the issue. It is hoped that the analysis and discussion contained in this thesis will assist lawmakers when considering reform of the existing law. Additionally, the doctrinal analysis and findings in

⁷ In his review of the functions of comparative law, De Cruz highlights law reform as one of the main purposes of comparative law research, Peter De Cruz, *Comparative Law in a Changing World* (Cavendish 1999), pp. 18–20. Zweigert and Kotz have also stated that "legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law", Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Clarendon 1998), pp. 15–16. Örüçü asserts that one of the main functions of comparative law is "to provide a pool of models for use in law reform", Esin Örüçü, *The Enigma of Comparative Law: Variations On A Theme For The Twenty-first Century* (Martinus Nijhoff Publishers 2004), p. 76.

this thesis may prove instructive to academics, lawyers, government bodies, students and any stakeholder that has an interest in contract law and consumer protection law reform.

5. Structure of the research

In order to accomplish the above objectives, the research is separated into five chapters each of which is concerned with discussion of a specific aspect of the problem.

Chapter one considers whether the main hypothesis of the thesis pertaining to the deficiency of the Kuwaiti regulatory model of unfair terms and the need for legislative intervention is correct. The discussion in this chapter is divided into two sections. Each section seeks to explore alternatives that can be used in lieu of the current deficient statutory provisions. In section one an attempt is made to ascertain whether the theory of defects of consent can be employed to control unfair terms. Consent is the cornerstone of the contract and the market practice has been that unfair terms are imposed on the weaker party through a standard contract against his will. Thus, it can be argued that the adhering party's acceptance is not a true representation of his contractual will and unfair terms can be challenged on the basis of deformed consent. Section two of this chapter focuses on the overarching principle of good faith and ascertains whether it can be employed to tackle unfair terms in so far as their imposition contradicts the duty of good faith that should prevail in contracts.

Chapter two is an analyses of the regulation of adhesion contracts and the current scope of protection against unfair terms. It highlights two issues relating to the regulation of the adhesion contract in the KCC: (i) lack of protection prior to the conclusion of the contract, and (ii) the discrepancy between the word of the law and the way it is applied.

The objective of this chapter is to review the protection approach and reconstruct the meaning of the adhesion contract by identifying the shortcomings of their statutory regulation and judicial interpretation. It starts by providing an historical account of the

adhesion contract as an exceptional contracting paradigm, why it has emerged and why protection of the weaker party is warranted. The rationale for this historical review is to show the inconsistency of the narrow interpretation of the Kuwaiti courts' of the notion of adhesion contracts with the modern concept of adhesion contracts. The chapter also discusses the procedural problems associated with the regulation of adhesion contracts and shows that the reason for this is that the code does not take into account the vulnerability of the adhering party prior to the conclusion of the contract. In order to overcome this pre-contractual vulnerability, suggestions are made for the enhancement of the weak contractual position of the adhering party prior to contract formation. The last issue the chapter deals with is the restrictive judicial interpretation of the notion of adhesion contracts and its impact on the scope of protection. It provides a critical analysis of the courts' attitude towards the definition and scope of adhesion contracts, and calls for the adoption of a more modern concept.

Chapter three is concerned with the meaning of the notion of contractual unfairness and attempts to find a basis for it in the Kuwaiti Civil Code. The code lacks any definition or standard for the meaning of the concept of unfair terms. Therefore, it is surrounded with ambiguity and uncertainty in both its meaning and application. The chapter begins with an investigation of the different types of contractual terms and classifies them into three main groups: (i) valid, (ii) invalid and (iii) unfair. The reason for this taxonomy is to discern the nature and connotation of unfair terms to distinguish them from other types of contractual terms. The discussion then proceeds to examine the rationale within the Civil Code for the protection against unfair terms. Lastly, the chapter attempts to resolve the ambiguity of the concept of unfair terms by arguing that the theory of abuse of rights can be used as a basis for the notion of unfair terms.

In chapter four the effectiveness of the judicial procedure in disputes involving unfair terms is assessed. The discussion revises the powers of the courts and the remedies available to them under Art. 81 KCC. Further, it argues for the need for an active judicial

involvement in unfair terms disputes by giving the courts the power to raise contractual unfairness on their own motion.

Chapter five complements the enforcement discussion presented in the previous chapter. It highlights the need to establish a public enforcement mechanism to control unfair terms at a market level to prevent their continued use. It argues that the individual litigation-based enforcement approach is not only insufficient to control businesses' unfair contractual practices in the market, but also indirectly contributes to their proliferation. Therefore, in order to overcome this shortcoming, proposals are made for the creation of a public body entrusted with the task of taking preventative measures against the use of unfair terms in the market on behalf of consumers.

In the end the research is concluded by a summary of the thesis findings and propose recommendations for law reform.

6. Editorial note

For the sake of consistency and consideration for the reader, this thesis was referenced using Oxford Standard for the Citation of Legal Authorities (OSCOLA). The computer software EndNote X7 was used to insert footnotes and generate the bibliography.

Chapter One: Deficiency in the General Principles of Contract Law in Controlling Unfair Terms

1.1 Introduction

Before discussing how the present regulatory model of unfair terms in the KCC can be reformed, it might be beneficial to explore whether the general principles of contract law can play a role in countering unfair terms. The phenomenon of unfair terms is a pure contract law problem as these terms are imposed on the adhering party against his contractual will by a superior party who dominates the contract formation. It could be argued that the imposition of such terms conflicts with the free will of the adhering party and their acceptance does not mean he consented to them. Similarly, their imposition is inconsistent with the principle of good faith that should prevail in transactions. Therefore, is it possible to have recourse to the classical principles and theories in the Civil Code, such as defects of consent and the principle of good faith, to request elimination or relief the adhering party from unfair terms? This chapter will attempt to answer this question and examine whether these principles can compensate for gaps in the law.

The objective of this chapter is twofold: (i) to discuss whether the classical legal principles in the KCC can be applied to protect consumers against unfair terms and (ii) to determine whether it is feasible to use the notion of good faith in the KCC to assess the fairness of contractual terms. Although the principle of good faith is an overarching principle in the Kuwaiti code, its connotations remain unclear and merit further research. Therefore, the discussion will involve reference to comparative law, in particular German, English, and French laws, to understand how the notion of good faith was employed to determine unfair terms and, consequently, to eliminate them.

1.2 Control of unfair terms through the theory of defects of consent

Central to the theory of the law of contract is the concept of *consent*. It implies that contracts cannot be deemed legal if the consent does not come from an informed and conscious will.⁸ Therefore, acceptance is crucial to the formation of the contract because it manifests the offeree's assent to adhere to a legal relationship; hence, it gives birth to the contract.⁹ One of the characteristics of the KCC is that it relies heavily on the autonomy of the will theory as a source for the binding force of the contract, and requires a subjective agreement and a true meeting of two wills in order for a contract to exist.¹⁰ Individuals are considered the best judges of their own interests and are able to decide what is appropriate and fair for them. However, the classical method of contract formation has gradually changed over the past century following the development of mass production and mass distribution, which gave rise to novel contractual mechanisms that were not known in the past. If one looks at the contracting mechanism in today's market one will notice that agreements are no longer a meeting of two minds; rather they are concluded by means of pre-drafted standard forms in which effective negotiation is absent and contracts are presented on a 'take-it-or-leave-it' basis. Contracting by means of a standard form of contracts (i.e., adhesion) has become the norm in the modern age in which effective negotiation between professionals and consumers is absent in almost all consumer contracts.¹¹ Consumers' options are limited to either signing on the dotted line or rejecting the agreement as a whole. The contract is no longer a meeting of two wills, rather, it is an

⁸ In the KCC three essential requisites must be satisfied in order for a valid agreement to come into existence: (i) consent, (ii) object and (iii) cause (Art. 122).

⁹ Ibrahim Abu Allail, *Contract and Unilateral Will* (2nd edn, Kuwait, Dar Alkotob 1998) (in Arabic), p. 115.

¹⁰ Abd-Alrazzaq Al-Sanhuri, *Middle Commentary on the New Civil Code*, vol 1 (3rd edn, Cairo, Dar Annahdha 1981) (in Arabic), pp. 103–108. Al-Sanhuri was the draftsman maker and the commentator on the Egyptian Civil Code and that was the model for the KCC and therefore Al-Sanhuri is an authoritative source for the Kuwaiti law.

¹¹ Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate 2005), p. 19; Hans- W Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (Hart 2010), p. 171. David Slawson estimated already in 1971, although with some exaggeration, that standard form contracts became the prevalent contractual instrument in the marketplace amounting approximately to 99% of all contracts, David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' 84 HarvLRev 529, p. 529.

imposition of the stronger party's terms upon the weak. If the contract is concluded in this way and contains unfair terms, then it is doubtful that consent was given in a free manner and the presumption is that mere acceptance of the offer does not suffice to establish mutual assent. If a consumer accepts unfair terms, then his consent might, one would argue, be deformed. Moreover, standard form contracts are characterized by their complexity of structure and sophistication of language. The average person can easily make mistakes as to the meaning of terms or the scope of the agreement. In this case, can error be invoked because the consumer misapprehended certain terms? Furthermore, if a professional misrepresents the terms, can fraud or exploitation be invoked to exclude or invalidate the unfair terms? Can unfair terms be annulled because the professional exploited the consumer's weakness in terms of lack of knowledge?¹²

1.2.1 Error

Standard form contracts are often complex and prepared using sophisticated language that is sometimes difficult even for lawyers to comprehend let alone laypeople.¹³ The complexity of contracts is ascribed to the sophisticated structure of certain transactions and also to their legalese.¹⁴ It is likely that consumers make mistakes about essential qualities of the agreement object or err in understanding certain aspects of the subject matter of the agreement 'by virtue of their bounded rationality and lack of information'.¹⁵ They may well fail to grasp the meaning of some clauses whether relating to, *inter alia*, substance, value, specifications of the product or service, contract duration or their rights and

¹² This is discussed in section 1.2.3.

¹³ Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms* (Cairo, Dar Annahdha Alarabia 1991) (in Arabic), p. 63; Hélène Bricks, *Les Clauses Abusives* (Librairie générale de droit et de jurisprudence 1982), p. 183.

¹⁴ John Burke, 'Reinventing Contract' 10 Murdoch U Elec JL 2, available at: http://www.murdoch.edu.au/elaw/issues/v10n2/burke102_text.html

¹⁵ Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' 70 UChiLRev 1203, pp. 1203–95.

obligations. Therefore, it is reasonable to assume that many individuals will fail to determine the scope of the agreement and the meaning of its terms.

Credit agreements could be used as an example. An agreement between a bank and a customer may not set out the terms accurately to a customer who enters into the agreement under the impression that the total sum he must repay to the bank is X instead of Y. The reason for this might be that the interest rate clause is not written in plain language or is buried in fine print, with the effect that his debt towards the bank is increased. It is then likely that he will fail to determine the scope of his liability towards the bank.¹⁶ Additionally, it is a common contractual technique, especially in contracts involving large corporations, that terms are contained in more than one document and are then incorporated by reference into one agreement. The external clauses may not be readily accessible at the time of the conclusion of the contract, leaving consumers unaware of certain issues that might affect their desire to enter into a binding agreement had they known about such terms beforehand. A question can be raised here relating to the validity of the consent of the consumer; can a contract including unfair terms written in a complex language be challenged on the basis of error because the consumer misunderstood their meaning? In other words, does misapprehension of complex legal clauses amount to error? The question becomes more difficult to answer if one takes into account the absence in the KCC of an express pre-contractual duty to draft contracts in plain and intelligible language.

To answer the question one needs to review the legal provisions relating to the notion of error then assess whether it can be used to eliminate unfair terms.

Art. 147(1) KCC provides: 'If a party to a contract errs in such a way as to prompt him to accept a contract, i.e. had he not erred he would not have consented to the contract,

¹⁶ This issue sparked many legal disputes and was much debated in Kuwait. The banks used to unilaterally adjust the interest rate in consumer loan agreements, allegedly on the grounds of the announced discount rate by the Central Bank, hence increasing debtors total debt. The result was the banks received twice the original value of loan. Several law suits were filed against the banks. The Cassation Court (2nd Commercial Circuit) in a recent decision (No. 1208/2006 on 1/6/2008) invalidated such clause on the grounds of arts. 111 and 115 of the Commercial Code that determine the interest rates and the principle of public order. The researcher is of the opinion that such a clause could also have been invalidated on the basis of error because customers' consent was deformed from the outset and they did not know how much their total debt would be.

then he may demand annulment of the contract if the other party has made the same error, had knowledge thereof, or could have easily discerned that an error was made.’

Error is a false perception occurring in at least one party’s mind relating to any of the requisites of the contract (e.g., consent, object and cause). Naturally, in consumer contracts it is the professional who prepares the contract and all related documents, and it is his responsibility to take all necessary measures to prevent the consumer from falling into error. Obviously, if the former executes his duties in good faith, then it would be unjust and unreasonable to hold him liable for the latter’s own carelessness.

The wording of the above provision shows that the code embraces the subjective approach of error in which consent could be vitiated by any type of error as long as it was substantive, that is, without which consent would not have been given at all. The Explanatory Note to the code provides examples of error that vitiate consent: it can be made as to the object of the agreement or its qualities, identity of the other party, motive for contracting, or to the value of the object.¹⁷ However, in order to avoid systematic recession of contracts, the code stipulates two conditions that must be met for an error to vitiate consent:

- i. Error should induce the mistaken party to enter into the contract, that is, the subject matter of error is the determining factor in contracting.
- ii. Error is communicated to the other party either by making the same error,¹⁸ knowing that the other party had made an error, or it was feasible for him to discern it.

Communication of error means that the other party is aware of the error. The Code provides three cases in which the contracting party's awareness is deemed to be

¹⁷ *The Explanatory Notes to the Civil Code* (4th edn, Council of Ministers 2004), pp. 137–138; Al-Sanhuri, p. 393 *et seq.*; Ibrahim Abu Allail, pp. 364–365.

¹⁸ This is unlikely in standardised contracts as they are the creation of the professional who drafts the terms of the agreement without participation from the other party.

established. First, if the party makes the same error as his counterpart, i.e. there is a shared error between the two contractors, such as when a fake painting is sold and both parties concluded the contract under the belief that it was genuine.

Secondly, if one party knows that his counterpart had unilaterally made an error but did not attempt to correct it, such as when the seller knows that the buyer purchased a defective product believing that it was fit for use.

Thirdly, if it was at least feasible for one party to know that his counterpart had made an error. Here, it is not necessary to show that seller knew that the buyer has actually made an error, rather it is sufficient to show that he was able to discern that his counterpart made an error.

In all three cases the remedy for error is the annulment of the contract however its basis differs in each case. In the first case both parties acted in good faith therefore neither party should contest his counterpart's request for the avoidance of the contract. In the second case, the other party knew an error had been made by his counterpart and despite that he acted in bad faith by failing to notify his counterpart of the error, therefore annulment in this case is the punishment for his bad faith. In the third case, the party was negligent in discovering the error and should bear the liability for overlooking the error.¹⁹

Thus, if the consumer misapprehends a contractual clause in a standard form contract due to its complexity, can the contract be rescinded on this basis?

Some writers have submitted, although with some caution,²⁰ that error can be invoked to eliminate unfair terms, provided two conditions are met: (i) the error must not be gross and inexcusable, that is, the average person cannot make it, and (ii) the error must relate to an essential element in the contract. It has been held in other jurisdictions that if a person makes mistake as to the meaning of the contract terms, then the court can rescind the contract on the basis of the error. In France, for instance, years before the promulgation

¹⁹ Abd-Alrazzaq Al-Sanhuri, p. 413

²⁰ Hassan Gemei, p. 63 *et seq.*, asserted that the absolute application of error to combat unfair terms might lead to instability in transactions

of the legislation of 10 January 1978 on unfair terms, the courts rescinded a loan contract on the basis of error because the borrower had misunderstood the terms and thought the loan was to be immediate, whereas, in fact, it was deferred.²¹ In addition, after France had adopted reforms to its currency system and introduced the new franc, several contracts were annulled on the grounds that there was dissent in understanding the contractual terms relating to the monetary unit used to measure the price.²² Although Art. 1110 of the French Civil Code limits error to (i) the actual substance of the thing that is the object of the contract, or (ii) to the identity of the other party, the French courts, nevertheless, did not hesitate to give the article a broad interpretation to annul the contract because there was error in the substance of the performance.²³

A similar approach can be applied by the Kuwaiti courts, especially with the knowledge that the broad wording of Art. 147 KCC allows nullification of the contract on the basis of *any* substantive error, as long as it was the determining factor for contracting without which there would not have been a contract. The subject matter of the error is irrelevant, what is relevant is the impact of the error on the will. Therefore, if the misapprehended terms were the determining factor for contracting then, this researcher believes that the contract could be rescinded on the basis of error, provided that the court is willing to interpret Art. 147 widely.²⁴

It is not impossible for consumers to err as to the meaning of standard agreement clauses. They can, in fact, do so in two instances: (i) when the terms are complex and difficult for the average person to understand and (ii) when the professional omits certain terms or conceals their true meaning to gain an advantage over the consumer. As

²¹ Lyon, 15.7.1952, D 1952, 753; also see Barry Nicholas, *The French Law of Contract* (Oxford, Clarendon Press 1992), pp. 99–100.

²² *Ibid.*, p. 100; Cass Com. 14.1.1969, for a discussion of the case, see Hugh Beale and others, *Cases, Materials and Text on Contract Law* (2nd edn, Oxford, Hart 2010), pp. 56–57; Hassan Gemei, p. 69; Hélène Bricks, pp. 182 *et seq.*

²³ Hugh Beale and others, p. 56; Barry Nicholas, p. 100.

²⁴ Although the text of the KCC is flexible, the courts were reluctant to give articles pertaining to the theory of contract a wider interpretation, see Jamal Al-Nakkas, 'The Expansive Direction of Judicial Interpretation of Contracts and Actions: A Study of the Decisions of Kuwaiti Court of Cassation and Comparative Law (in Arabic)' 23 *Jourol* 13, pp. 52–55.

mentioned earlier, the code uses the principle of good faith as an indication for the unfairness of the terms as explained in the Explanatory Notes to the Code.²⁵ If the professional prepares the terms contrary to the principle of good faith, then the terms can, in theory, be deemed unfair. In addition, the party has a contractual obligation to execute the contract and carry out its duties in good faith as is required by the Civil Code.²⁶ The duty of good faith entails that the professional fulfils his pre-contractual duty of providing information by giving all factual details about the transaction and its scope. In case of complex agreements, the professional must prepare the terms in comprehensible and lucid language so that the consumers' consent can be informed and represents free will. However, unlike the situation in other countries,²⁷ a general obligation to disclose information is unfortunately not yet recognized in the Kuwaiti legal system; neither by statutes nor by courts as a standalone pre-contractual duty that should be applied in all contractual relations.²⁸ In addition, there is no express duty on professionals to draft contracts in a comprehensible and clear language. Some jurisdictions have engaged actively in this regard, and codified the requirement of plain and intelligible language to make agreements readable to the average consumer to protect him from the abuse of language by professionals.²⁹

²⁵ , *The Explanatory Notes to the Civil Code*, p. 95.

²⁶ Art. 197 KCC provides that "the contract must be executed in pursuant to its provisions and in a manner consistent with good faith and honourable dealing".

²⁷ In France the pre-contractual duty to provide information is well established and has been developed incrementally mainly by the courts and scholastic research from 1945 onwards; see Jacques Ghestin, 'The Pre-Contractual Obligation to Disclose Information' in Donald Harris and Denis Tallon (eds), *Contract Law Today, Anglo-French Comparisons* (Oxford University Press 1989), p. 152 *et seq.* There is disagreement as to whether a similar duty exists in common law; for discussion and evaluation in English law, see Pierre Jr. Legrand, 'Pre-contractual disclosure and information: English and French law compared' 6 OJLS 322; Barry Nicholas, 'The Obligation to Disclose Information: English Report' in Donald Harris and Denis Tallon (eds), *Contract law today: Anglo-French comparisons* (Clarendon Press 1998), p. 166 *et seq.*; cf. Sjef Van Erp, 'The Pre-Contractual Stage' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004), pp. 363–280.

²⁸ Instances of obligation to disclose information can be found in provisions relating to insurance agreements (articles 790 and 791) and in the contract for the sale of goods where the seller is obliged to provide the purchaser with all necessary information pertaining to the sold object (Art. 467). This obligation can also be implicitly inferred from Art. 152 where the code prohibits fraudulent silence which indirectly constitutes an obligation of disclosure. In the same vein, see Hassan Gemei, *Consumer Protection: the Special Protection of the Consumer's Consent in Consumer Contracts* (Dar Annahdha Alarabiyah 1996) (in Arabic), p. 15.

²⁹ Art. 5 of the Directive provides that "In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language". The requirement

Although the theory of error can be an important vehicle for protecting the consumer's consent against contractual unfairness, it, nonetheless, might not always be favourable to allow relief because of its legal effect. The effect of error is to void the entire contract *ab initio*. Therefore, if a consumer manages to prove and convince the court that there was error as to the terms, the court will have to annul the entire agreement pursuant to Art. 147 stated above. It cannot annul the unfair terms alone or amend them in the consumer's favour because error is an obstacle to the formation of the contract and precludes the meeting of wills in the first place.³⁰ This solution is only desirable when the consumer wants to annul the entire agreement such as when the error is made as to the terms determining the nature of the agreement (*error in negotio*) or the object thereof (*error in substantia*). However, the consumer's interest does not always lie in the annulment of the whole agreement, especially when products or services are provided along the same terms and conditions in the market.³¹ Therefore, if the consumer wants to invalidate only certain clause(s), his quest will certainly not succeed.

The question of whether the concept of *fraud* provides the desired outcome for consumers will be answered in the next section.

1.2.2 Fraud

The other defect of consent that vitiates the contract is fraud. Fraud is regulated in articles 151–155. Art. 151 provides that "A contract may be annulled on the grounds of fraud when one party consented due to artifices practiced against him to induce contracting, provided that it is proven that he would not have accepted the contract without such artifices".

is also known as *the principle of transparency*. This article has been incorporated into the national laws of most EU Member States; see Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier, European Law Publishers 2008), p. 246. The UK, for instance, transposed (Art. 5) into domestic legislation via (regulation 7.1) of the Unfair Terms in Consumer Contracts Regulations, 1999 (hereinafter 'UTCCR').

³⁰ The court is able to amend the contractual terms in certain contracts, notably in contracts of adhesion. However, the courts do not regard consumer contracts *per se* as contracts of adhesion.

³¹ Hélène Bricks, p. 187; *Hassan Gemei, The Effect of Inequality between Contractors on the Contract Terms*, p. 70.

Fraud is very much akin to error because both engender false perception but they diverge in the way consent is obtained. While error can be made without external influence, consent in fraud is always expressed only after deceptive means had been used to mislead a person into contracting fraudulently.³² Mere lies and usual business exaggerations (*dolus bonus*) do not amount to fraud unless they exceed the normal limit and contravene the duties of honesty and good faith.³³ Therefore, artifices must be unlawful to void the contract. They may consist of forged documents, false statements or deliberate concealment of important information.³⁴ Negative behaviour such as silence equals artifices if one party has an obligation to speak but decides to withhold vital information from the other.³⁵ An obligation to disclose information can be imposed on both parties either by agreement³⁶ or by law.³⁷

Art. 151 sets out three conditions in order for a contract to be annulled on the basis of fraud: (i) artifices were used to obtain consent, (ii) fraud is the determining factor for consent and (iii) fraud is committed by a contracting party or he is at least aware of it.

Disagreement exists as to whether the victim of fraud can avoid the contract if the contract includes onerous (unfair) terms. Some scholars³⁸ rejected the idea of rescinding the contract if artifices were created to influence a person into accepting burdensome obligations, arguing that fraud must relate to the substance of the agreement. They make a

³² Ibrahim Abu Allail, p. 370; Abd-Alrazzaq Al-Sanhuri, p. 422 *et seq.*; Barry Nicholas, *The French Law of Contract*, pp. 100–102.

³³ Ibrahim Abu Allail, pp. 372–373.

³⁴ *Ibid.*, p. 374; Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 72; Hélène Bricks, p. 188.

³⁵ Art. 152 of the Kuwaiti Civil Code.

³⁶ In insurance contracts, for example, the insuree has a duty to disclose all information relevant to the formation of the contract Art. 790(1), such as his medical condition in life insurance and if he is suffering from any illness.

³⁷ Abd-Alrazzaq Al-Sanhuri, p. 427. The imposition of such a duty is based on a duty of co-operation owed by the parties to the contract; see Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (Cambridge University Press 2000), pp. 216–219. It has also been established in the French courts that silence may constitute fraud if one party fails to correct a known misunderstanding in other party's mind; see Muriel Fabre-Magnan and Ruth Sefton-Green, 'Defects on Consent in Contract Law' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004), p. 403; Barry Nicholas, *The French Law of Contract*, p. 102; Abd-Alrazzaq Al-Sanhuri, p. 427.

³⁸ For a review of this opinion, see Solaiman Murkus, *An Adequate Commentary on Civil Law*, vol 1 (4th edn, Cairo, Dar Alkotob 1987) (in Arabic), pp. 387–388; see also Barry Nicholas, *The French Law of Contract*, p. 111 for the difference between both types of fraud.

distinction between two types of fraud: (i) determinant fraud and (ii) incidental fraud, and argue that onerous terms are one example of the latter because the contract would have been concluded in any case, regardless of the nature of the terms, and that the courts should deny the claim for avoidance and only award damages. This view was, however, criticized by other scholars.³⁹ In the opinion of Al-Sanhuri it is irrelevant whether fraud was perpetrated as to the object of the agreement or the terms of the agreement because one cannot separate the contractual will that accepted the agreement from the terms that prompted consent in the first place. Other writers support this view and regard the distinction between a contract and its terms as being unworkable⁴⁰ and the courts rarely refuse to rescind on the grounds of incidental fraud.⁴¹

If consumer contracts in today's market are examined, one will find in many agreements that professionals fraudulently attempt to insert unfair terms to disturb the equilibrium of the contract. This includes the intentional misrepresentation of the meaning of terms and omission of certain crucial terms. In other, less extreme, cases, the reader may not be able to read the terms because they were written in very small print. In this regard, a French court held that if a company disguises a term that provides that a loan cannot be benefited from unless a few years have elapsed and fails to place this important term in a noticeable part in the contract, then the company has induced its customer to make an error relating to an essential element of the contract. In the case in question, the contract also included a term that confirmed that the customer had thoroughly read and completely understood the terms despite its small print. The court concluded that it was hard for the customer to read a document with such a small font and understand the meaning of the clauses. The court therefore decided to rescind the contract on the grounds of fraud

³⁹ Solaiman Murkus, pp. 387-388.; Al Abd-Alrazzaq Al-Sanhuri, pp. 431-433; Ibrahim Abu Allail, p. 375; Abdulrasol Abudredha and Jamal Al-Nakkas, *A Concise Commentary on the General Theory of Obligations*, vol 1 (Kuwait, Dar Alkutub 2006) (in Arabic), p. 101.

⁴⁰ Barry Nicholas, *The French Law of Contract*, p. 111.

⁴¹ Hugh Beale and others, p. 436.

because the company's act constituted fraudulent non-disclosure (*dol par reticence*) and failed to fulfil its contractual duty to inform the other party.⁴²

Some commentators have submitted that it is appropriate to invoke the theory of fraud to challenge unfair terms when the professional fails to fulfil his pre-contractual obligation of providing information.⁴³ However, as with error, this theory is limited and partial in scope in that it is applicable in fraud cases and will fall short in providing comprehensive treatment of the problem, especially when one takes into account that there is no statutory obligation on the parties to perform a pre-contractual duty of providing information, as well as the absence of the principle of transparency.⁴⁴ In addition, the burden of proof is placed on the consumer who has to prove the existence of the deceitful intent of the professional to defraud him. Similar to the situation in error, if the court accepts the consumer's claim, then it cannot eliminate the unfair terms alone but must annul the entire agreement in accordance with Art. 151; an outcome the consumer may not prefer in all instances.

Moreover, the application of the theory lies in the discretionary power of the court, which might lead to conflicting judicial decisions in this regard.

⁴² Aix 15.2.1950, JCP, 1950, I, 5548, mentioned in Hélène Bricks, p. 195. Although the obligation to inform is not expressly mentioned in the French Civil Code, the French courts deduced it from Art. 1134(3) which requires contracts to be performed in good faith and Art. L 111-1 of Code de la Consommation: "Every professional seller of goods shall, before concluding the contract, put the consumer in a position to know all essential characteristics of the good." The researcher believes that this obligation can be inferred from Art. 197 KCC which provides: "Contracts must be executed according to its terms and in a manner consistent with good faith and honest dealing".

⁴³ Hassan Gemei, *Consumer Protection: the Special Protection of the Consumer's Consent in Consumer Contracts*, p. 74–75. Gemei criticized the confined notion of fraud, and called on the courts to follow in the footsteps of the French courts and adopt a wider concept of fraud that allowed for invalidating unfair contractual terms on the grounds of fraud, p. 77; see also Omar Abdulbaqi, *The Contractual Protection of the Consumer* (Alexandria, Monshat Al-Maaref 2008) (in Arabic), p. 347.

⁴⁴ Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, *ibid.*; see also Omar Abdulbaqi, pp. 344–345.

1.2.3 Exploitation

Exploitation occurs when one party abuses a weakness in another and influences him to enter into a contract that results in a gross disparity between the performances of the parties.⁴⁵ In this regard, Art. 159 KCC provides as follows:

"If a person exploits in another a compelling need, obvious recklessness, apparent weakness, inordinate affection, or if he exploits his moral influence to make him enter into contract for his own interest or the interest of a third party that results in a gross imbalance between the performance to be executed and the economic or moral profit to be received, such that conclusion of the contract was in conspicuous denial of the honour of dealing and the requirement of good faith, then the judge is entitled, upon request from the victim of exploitation and in accordance with justice and in consideration of the circumstances of the case, to reduce the undertakings of the victim, increase the undertakings of the other party, or annul the contract".⁴⁶

Exploitation, according to this article, consists of two elements. The first element is subjective (i.e., mental) and concerns the existence of a weakness in the exploited party, as enumerated above, which led him to accept an unbalanced contract. The second is objective (i.e., material) and relates to the gross disproportion of the rights and obligations of the parties where the victim of exploitation enters into a contract that imposes greater obligations or stricter terms on him.⁴⁷ Normal disproportion of performances is not enough; it must be gross and unusual. Disproportion cannot be measured in terms of monetary value but rather in terms of the effect of the exploitation on the victim and should be examined on a case-by-case basis. Therefore, the court must employ a material test and

⁴⁵ Abd-Alrazzaq Al-Sanhuri, p. 476; Ibrahim Abu Allail, p. 385.

⁴⁶ It is worth noting that the KCC was influenced by section 138.2 of the German Civil Code (BGB) but does not confine it to pecuniary advantage; see *The Explanatory Notes to the Civil Code* p. 137.

⁴⁷ Cass. Civ. Case No. 156/2002, 30.9.2002; Cass. Comm (3). Case No. 934/2004, 4.3.2006; see also Ibrahim Abu Allail, pp. 386–387; Abd-Alrazzaq Al-Sanhuri, p. 484 *et seq.*; Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 86.

make comparison between what each party received or undertook versus the other. If the disparity is insignificant then the contract will remain effective because complete balance between the performances of the parties is not required and is not feasible all the time.⁴⁸

Unlike the previous defect of consent, the doctrine of exploitation is characterized by its flexibility and applicability in various contexts and can, albeit to a limited extent, contribute indirectly to the control of unfair terms in consumer contracts. The requirement of apparent weakness is already present in consumers because they are always the inferior contractual party by virtue of their lack of information and inequality of bargaining power.⁴⁹ Professionals' superiority in terms of knowledge and bargaining power enables them to exploit consumers' bounded rationality and inexperience to impose unfair terms that better reflect their interests. This view can be substantiated by the example of exclusion clauses which professionals frequently incorporate into contracts to oust liability owed to their consumers. Therefore, the comparison between the parties' obligations should not only be limited to the object of the agreement, but should also extend to comprise comparison between the terms of the contract and what they entail. Some commentators champion this view and argue that the comparison of undertakings necessarily involves assessment of the terms.⁵⁰ In addition, the court may at the request of the exploited party reduce his undertakings, which can include elimination of the unfair terms.⁵¹

However, it is uncertain whether the theory of exploitation will succeed in offering the protection that consumers seek against all unfair terms, for two reasons. First, its scope of applicability is limited because the degree of disproportion between the obligations the article requires is a major impediment and precludes its application to cover

⁴⁸ Abd-Alrazzaq Al-Sanhuri *ibid.*, p. 485.

⁴⁹ Abu Allail argues that the five instances mentioned in Art. 159 are only examples and regards "apparent weakness" as a general criterion to encompass all cases of weaknesses including inexperience in contractual matters, p. 390.

⁵⁰ Mohammad Abd Al-Aal, *The Concept of the Weak Party in the Contractual Relationship* (Cairo: Dar Annahdha Al-Arabiya 2007) (in Arabic), pp. 32–33.

⁵¹ *Ibid.*

all types of unfair terms. The contract equilibrium may well be upset in the sense that it imposes stricter obligations on the consumer or relieves the professional from liability but the disparity does not necessarily amount to gross disproportion. Second, the burden of proof will fall on the consumer who must show that the professional took advantage of his weakness. This is a very heavy burden and is unlikely to be discharged in most cases because the professional does not necessarily want to exploit a weakness in the consumer but to maximize his wealth.⁵²

1.2.4 Conclusion

In sum, the theory of defects of consent can play a role, albeit limited, in controlling unfair terms because the consumer's consent cannot be regarded as free if unfair terms were imposed against his will. However, success of the application of the theory will always depend on the judicial desire to embrace a broad interpretation of the law to cover unfair terms. In addition, it is useful only if the consumer wishes to walk away from the agreement and not to eliminate the unfair terms alone.

1.3 Can the principle of good faith be used to determine contractual unfairness?

As mentioned earlier, the Explanatory Notes to the KCC establishes the concept of contractual fairness on the principles of good faith and honorable dealing.⁵³ It is clear that the code establishes a connection between good faith and fairness. If an unfair term exists, then it is because the duty of good faith has been breached. However, it is unfortunate that the Kuwaiti courts have not thoroughly considered good faith and that the application of the relatively recent code (31 years old) did not develop any specific connotations of good faith. The entire notion of good faith is not clear and requires investigation, firstly, to

⁵² Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 87.

⁵³ , *The Explanatory Notes to the Civil Code*, p. 95.

understand its meaning and nature, and, secondly to understand its relationship with the notion of unfairness.

In the following pages, I will attempt to clarify the meaning of the principle of *good faith* in the context of the Kuwaiti code and its relationship to unfair terms to assess whether it is a sufficient foundation for contractual fairness. Owing to scarce resources, it would be helpful to examine the concept of good faith in other jurisdictions to understand its meaning and assess whether it should form the basis of contractual fairness.

The discussion will begin by considering the notion of good faith in comparative law and will then move on to analyse it from a Kuwaiti perspective.

1.3.1 Good faith in comparative law

Good faith is a universal concept that is recognized as one of the general principles of contract law in many legal systems around the world. The *Principles of the European Contract Law*⁵⁴ and the International Institute for the Unification of Private Law (French: Institut international pour l'unification du droit privé) (UNIDROIT) *Principles of International Commercial Contracts*⁵⁵ acknowledge the importance of good faith and fair dealing in contractual relations. Its meaning, however, is not one that is recognized in the legal systems. In each legal system good faith is embedded in a particular arrangement of doctrine in which it plays its own distinctive role.

1.3.1.1 Good faith in German law

According to Zimmermann and Whittaker, there are two types of good faith in the *Bürgerliches Gesetzbuch* (BGB) or the German Civil Code: (i) subjective good faith (*guter*

⁵⁴ Art. 1.201(1) provides: "Each party must act in accordance with good faith and fair dealing"

⁵⁵ Under the heading good faith and fair dealing, Art. 1.7(1) states: "Each party must act in accordance with good faith and fair dealing in international trade".

Glaube) and, more importantly, (ii) objective good faith (*Treu und Glauben*). Subjective good faith relates more to the personal knowledge, psychological condition or perception of the party. By contrast, objective good faith constitutes a standard of conduct to which the parties' behaviour has to conform and by which it may be judged.⁵⁶

The concept of good faith in its objective sense has been of significant importance in Germany where the principle of *Treu und Glauben* is found under the heading of 'performance in good faith' in section 242 of the BGB. This section reads: 'The debtor must perform his obligation in accordance with the requirements of good faith taking into account the prevailing practice'.⁵⁷ The literal wording of the text suggests that good faith regulates only performance of the obligation but the courts and legal writers have given its meaning a broader scope.⁵⁸ In case law a fundamental principle of contract law has been derived from this article requiring the parties to the contract – the debtor and the creditor – to effectuate their rights and perform their obligations in accordance with good faith. The German courts have also relied on section 242, and section 157⁵⁹ which relates to the interpretation of contracts, to create new causes of action where the statute has not provided a cause of action⁶⁰ such as liability for breach of pre-contractual duties. The theory of fault in contracting (*culpa in contrahendo*) is a judicial creation, which finds its roots in section 242, entitles the injured party to claim for damages if the pre-contractual duty has been breached.⁶¹

⁵⁶ Reinhard Zimmermann and Simon Whittaker, p. 30.

⁵⁷ An English translation of the article is provided in Hugh Beale and others, p. 775. The original German text reads: "*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*", available at: <http://www.gesetze-im-internet.de/bgb/BJNR001950896.html>.

⁵⁸ Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International 2008), p. 34

⁵⁹ "Contracts are to be interpreted in accordance with the dictates of good faith taking into account normal commercial practice" (*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*).

⁶⁰ Werner Ebke and Bettina Steinhauer, 'The Doctrine of Good Faith in German Contract Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1997), p. 171.

⁶¹ *Ibid.*, p. 172.

Because the BGB does not define good faith and for purposes of the concretisation (or domestication)⁶² of the concept of good faith, there have been scholarly efforts⁶³ to analyse the decisions of the courts to render the application of good faith as rational and objective as possible instead of leaving it to the subjective interpretation of each judge.⁶⁴ The functions of good faith have been identified and systematically arranged in groups according to the cases that applied good faith. The process of concretisation has made the concept of good faith more understandable and sensible. In general, the German approach distinguishes three functions of section 242: (i) supplementary function as a basis for secondary or ancillary obligations, such as duty of information, co-operation and disclosure, as well as filling gaps in the law, (ii) limitation function to set limits to the rights and prevent their abuse, and (iii) corrective function that allows for adaptations to a contract in cases of changed circumstances.⁶⁵ In addition to these three functions, section 157 of the BGB refers to good faith as a tool for interpretation and provides that contracts must be interpreted as required by good faith. The wide wording of section 157 enabled the German courts to intervene in contractual relations and provide for supplementary interpretation.⁶⁶

Some commentators⁶⁷ have asserted that the most significant doctrinal development based on section 242 was the judicial formulation of an appropriate and distinct body of rules for the control of the standard form of contracts.⁶⁸ The courts reviewed and invalidated standard contract terms because they violated the principle of

⁶² Reinhard Zimmermann and Simon Whittaker (n 37), p. 23.

⁶³ Franz Wieacker was the first to specify the theoretical status of Art. 242 and articulates the functions of good faith in his seminal work *Zur rechtstheoretischen Präzisierung des § 242 BGB* (1956).

⁶⁴ Martijn Hesselink, 'The Concept of Good Faith' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004), p. 474.

⁶⁵ Chantal Mak, p. 34; Martijn Hesselink, pp. 475–478; Reinhard Zimmermann and Simon Whittaker (n 37), pp. 24–25

⁶⁶ Reinhard Zimmermann and Simon Whittaker, p. 30.

⁶⁷ *Ibid.*, p. 27; Arthur Von Mehren, 'A General View of Contract' in Arthur Von Mehren (ed), *International Encyclopedia of Comparative Law*, vol VII (Tübingen 1982), p. 70.

⁶⁸ Some lawyers described the judicial intervention when the contract did not translate the parties' true will as a "page of glory" in the records of the German judiciary; see Reinhard Zimmermann and Simon Whittaker, p. 27. For a historical overview of the judicial review of standard contracts in Germany, see Arthur Von Mehren, pp. 70–72. It should be noted that the German courts also invoked section 138.1, which prohibits legal transactions contrary to good morals (*guten Sitten*), to review and control standard terms.

good faith.⁶⁹ The resulting case law formed the foundation for new legislation on standard contract terms, and good faith was subsequently channelled and codified in section 9 (now section 307 of the BGB) of the Standard Contract Terms Act, 1976 (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*) (*AGB-Gesetz*). According to section 9(1):

"Provisions in standard contract terms are void if they unreasonably disadvantage the contractual partner of the user contrary to the requirements of good faith.

1. In case of doubt, a provision is unreasonably disadvantageous if this provision is irreconcilable with essential basic principles of the statutory provisions from which the terms deviate, or
2. Essential rights or duties arising from the nature of the contract are restricted to a degree which jeopardizes the purpose of the contract being attained".⁷⁰

The legislative inclusion of good faith as a test for fairness bears out the importance of good faith as an underlying principle in German contract law. The code uses it as a criterion to qualify a clause as unfair. However, the Act adds another requirement of a substantive nature for an unfair term to be invalidated and that is the term has to put the adhering party at an unreasonable disadvantage (*unangemessen benachteiligen*). The German approach seems to have strongly influenced the European conceptual framework of the notion of unfairness in consumer contracts, and the great similarity between the test of fairness in the *AGB-Gesetz* and the test of fairness in the Directive cannot be overlooked. The Directive refers to good faith at Art. 3(1), besides significant imbalance,

⁶⁹ Martijn Hesselink, p. 479.

⁷⁰ A translated version of *AGB-Gesetz* can be found at: <http://www.iuscomp.org/gla/statutes/AGBG.htm>.

as a criterion to determine the fairness of the terms.⁷¹ In fact, the Directive inserted the requirement of good faith among the criteria due to its significance in German law and other continental systems.⁷²

1.3.1.2 *Good faith in English law*

In contrast to Germany, English law does not recognize a general principle of good faith and takes a different approach, relying on a number of specific doctrines aimed at securing fair dealing to achieve the same outcome. The situation is not the same in other common law countries. In the United States, for example, good faith plays a comprehensive role and section 205 of the Restatement of Contracts (Second) states that: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'.⁷³ Furthermore, in Australia both courts and lawyers are open to the use of good faith in contracting and regard it as an enforceable duty.⁷⁴

However, the concept of good faith is not totally absent in the English legal system. It appeared for the first time in 1766 in the historical landmark case of *Carter v Boehm*⁷⁵ in which Lord Mansfield established the principle of utmost good faith (*uberrimae fidei*) in insurance transactions where the parties are bound to disclose all important facts relating to the risk before and in the course of the contract. Lord Mansfield described 'of good faith' as 'the governing principle . . . applicable to all contracts and dealings'.⁷⁶ However, despite the significance of this case, English courts have always opposed the recognition of a general principle of good faith on the grounds that it would

⁷¹ Art. 3.1 provides: "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

⁷² Paolisa Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart 2007), p. 143.

⁷³ The Uniform Commercial Code, too, makes reference to good faith and defines it in section 1-201(19) to mean "honesty in fact in the conduct or transaction concerned".

⁷⁴ Joseph Chitty and Hugh Beale, *Chitty on Contracts* (29 edn, Sweet & Maxwell 2004), para 1-022.

⁷⁵ (1766) 3 Burr 1905.

⁷⁶ At 1910.

run counter to the parties' respective positions during contract negotiations and over the duration of the contract and was impracticable.⁷⁷ The subject remained of marginal interest to English lawyers for many years until its transformation in modern history. The transformation was signalled by *Banque Financière de la Cité SA v Westgate Insurance Co Ltd*⁷⁸ and *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*.⁷⁹ A few years later, a legislative intervention by the European community took place, firstly, with the issuing of the Directive on Commercial Agents (86/653/EC) and, most significantly, with the EU Council Directive on Unfair Terms in Consumer Contracts (93/13/EC) which used good faith as a test for fairness. This prompted a substantial body of writing.⁸⁰

The transposition of the Directive, through the Unfair Terms in Consumer Contracts Regulations 1994 (now 1999) (hereinafter 'UTCCR'), introduced to English law the requirement of good faith in a significant number of consumer contracts, leading to concerns whether the influence of good faith in consumer contracts would extend beyond the scope of the regulations and percolate through to other areas of contract law (particularly commercial contracts). In the absence of a general doctrine, how would the English courts interpret the good faith requirement in the UTCCR?

The courts do not seem to have experienced any particular difficulty in giving effect to the good faith requirement. Indeed, they have recognized its European origins and

⁷⁷ Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999), p. 167.

⁷⁸ [1989] 2 All ER 952.

⁷⁹ [1989] QB 433. Lord Bingham was one of the early judges to shed light on the concept of good faith, articulating its meaning in a comprehensive manner as follows:

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; 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". (At 439.)

⁸⁰ See, for example, Hugh Collins, 'Good Faith in European Contract Law' 14 OJLS 229; Ewoud Hondius, 'EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract' 7 JCL 34; Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007); Daniel Friedmann and Jack Beatson, *Good Faith and Fault in Contract Law* (Clarendon Press 1995); Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' 61 MLR 11.

have not sought to interpret it from a national perspective. In *Director General of Fair Trading v First National Bank*, Evans-Lombe J, after noting that the origin of the UTCCR was a Council Directive, stated that good faith should not be construed in the English sense of absence of dishonesty, but rather in the continental civil law sense. In the Court of Appeal⁸¹ Peter Gibson LJ stated that good faith had a special meaning in the UTCCR, having had its conceptual roots in civil law systems. In the House of Lords⁸² both Lord Bingham and Lord Steyn recognized that good faith was an 'objective criterion' that imported the 'notion of fair and open dealing'. Therefore, the concept of good faith as enacted in the UTCCR should not pose any problems in the English law. However, some⁸³ have rejected the existence of good faith and expressed a negative view, mainly because they fear that the recognition of the concept of good faith in consumer contracts would extend to commercial contracts. This concern is not justified because the recognition of good faith in the UTCCR does not entail recognition of a general doctrine of good faith, and the concept of good faith in the Regulation is of specific application and only applies to contracts between consumers and suppliers. However, the influence of the UTCCR on the development of good faith in English law cannot be ruled out. A growing number of lawyers, support the recognition of a doctrine of good faith and believe that good faith should play a role in English contract law.⁸⁴ However, the decision of the House of Lords in *Walford v Miles*⁸⁵ constitutes an obstacle to the full recognition of a doctrine of good faith in English law. In this case it was held that English law did not recognize the validity

⁸¹ [2000] QB 672, at 686.

⁸² [2001] UKHL 52

⁸³ See, for example, Mark Snyderman, 'What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending', 55 UChiLR 1335; Clayton P. Gillette, 'Limitations on the Obligation of Good Faith' (1981) Duke LJ 619; Michael G. Bridge, 'Does Anglo-Canadian Contract Law Need A Doctrine of Good Faith?' (1984) 98 Can Bus LJ 385.

⁸⁴ See sub-section (iii) below on the positive view.

⁸⁵ [1992] 2 A.C. 128

of an obligation to negotiate in good faith, therefore, such an obligation was not enforceable.⁸⁶

Roger Brownsword has identified three distinct views on good faith in English legal doctrine, the (i) negative, the (ii) neutral and the (iii) positive.⁸⁷ In the following I will introduce these three views.

i. The negative view

The arguments against the adoption of a general standard of good faith in English law can be summarised as follows:

- i. Good faith requires each party to take into account the legitimate interests or expectations of one another and this cuts against the essentially individualistic ethic of English contract law. As Lord Ackner asserted in *Walford v Miles* the adoption of a requirement of good faith would be incompatible with the adversarial ethic underpinning English contract law: "The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiation". He concludes "a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party".⁸⁸
- ii. It is said, mainly by sceptical North American lawyers, that good faith is a 'loose cannon' in commercial contracts in the sense that it is an uncontrollable standard and might well lead to unintended results. While it is accepted that good faith imposes restrictions on the individual's pursuit of self-interest, it is not clear, however, what the limitations of good faith are. In the words of Brownsword:

‘good faith presupposes a set of moral standards against which contractors are to be

⁸⁶ Lord Ackner at 138 stated: "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party".

⁸⁷ Roger Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma Hird and Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (Ashgate 1999), pp. 15–32.

⁸⁸ At 138

judges, but it is not clear whose (or which) morality this is. Without a clear moral reference point, there is endless uncertainty about a number of critical questions'. The following questions, *inter alia*, arise: Should good faith be interpreted in the subjective sense or the objective sense? Should it regulate all phases of contracting, including pre-contractual conduct? Should it regulate matters of procedure only or matters of contractual substance as well? Proponents of the negative view hold that without answering their critical questions, the idea of good faith will remain vague and uncertain.⁸⁹

- iii. The third concern is that good faith would call for difficult inquiry into the contractors' state of mind. This would involve speculating about the contractors' reasons for action.
- iv. If good faith were to regulate matters of substance, then it would violate the autonomy of the parties and would become inconsistent with the philosophy of freedom of contract.
- v. The final argument of the negative view is that a general doctrine of good faith fails to recognize that contracting contexts are not all alike.

In summary, the opponents to the adoption of a general doctrine of good faith premise their rejection on the fact the English contract law is based on adversarial, self-interested dealing, and that good faith is a vague and uncertain notion and would call for difficult inquiries into the parties' reasons for contracting. In addition, the implementation of good faith goes against the notion of the autonomy of contracting parties, and that a general doctrine would be inappropriate in certain contracting contexts where individuals tolerate opportunism.⁹⁰

⁸⁹ Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', pp. 16–17 (n 87).

⁹⁰ *Ibid.*, p. 21

ii. The neutral view

The neutral view⁹¹ is held by many lawyers who see there is nothing ‘intrinsically objectionable’ about a good faith doctrine and, at the same time, point out that English law developed its own concepts and doctrinal tools that achieve the same results that are achieved through good faith in other legal systems, such the doctrines of frustration, misrepresentation, economic duress, promissory estoppels and mistake.⁹² It is apparent that this view coincides with and echoes Bingham’s statements in the *Interfoto* case. Lord Bingham noted that English law had characteristically committed itself to no such overriding principle, but had developed piecemeal solutions in response to demonstrated problems of unfairness.⁹³ Accordingly, the adoption of a general doctrine of good faith in English law is neither a good nor bad thing as there is a ‘strict equivalence’ between a general doctrine of good faith and the piecemeal solutions of the English law, on the one hand, and it makes no difference whether the English law operates with good faith or piecemeal provisions, on the other.⁹⁴

The neutral view leans strongly in the direction of the negative view, simply because it suggests that nothing will be gained by replacing the existing approach with another that achieves the same outcome and, therefore, if a choice is to be made between introducing a new doctrine or maintaining the piecemeal provisions then, from an English lawyer standpoint, the choice would be to maintain the status quo.

iii. The positive view

In 1956 Raphael Powell published a seminal article setting out his view on good faith and whether it should be recognized in English law.⁹⁵ He maintained that although no overriding general positive duty of good faith was imposed on the parties to a contract,

⁹¹ Ibid.

⁹² Ibid.

⁹³ At 439.

⁹⁴ Brownsword calls this argument the "equivalence thesis" or the "indifferent thesis", p. 22.

⁹⁵ Raphael Powell, ‘Good Faith in Contracts’ 9 CLP 1616.

there were a number of individual cases in which the law contained an element of objective or subjective good faith.⁹⁶ Powell also indirectly criticized the English piecemeal approach and suggested that common law may be improved if an explicit rule of good faith were adopted.⁹⁷ In his opinion, the courts could reach similar results in certain cases if a doctrine of good faith was implemented instead of resorting "to contortions or subterfuges in order to give effect to their sense of the justice of the case".⁹⁸ Powell's view was unpopular among English contract lawyers and only a few accepted his view.⁹⁹

One of the most prominent proponents of the introduction of a general doctrine of good faith in English contract law is Brownsword, who gives the several reasons for the adoption of good faith.¹⁰⁰ His argument can be summarised as follows:

1. As English law already tries to regulate bad faith dealing, it would be more rational to address the problem directly (rather than indirectly) and openly (rather than covertly) by adopting a general principle of good faith.
2. In the absence of a doctrine of good faith the law of contract is ill-equipped to achieve fair result, on occasion leaving judges "unable to do justice at all".
3. With the adoption of a doctrine of good faith the courts will be equipped with a better mechanism that will enable them to respond to the varying expectations encountered in the many different contracting contexts and, in particular, it might be argued that the courts are better able to detect co-operative dealing where it is taking place.

⁹⁶ Ibid., pp. 23–25.

⁹⁷ In support of his argument, Powell cited *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 in which the court enforced the agreement even though the plaintiff could not read an exclusion clause that was printed on brown paper and buried in small print, *ibid.*, p. 27

⁹⁸ Ibid., p. 26

⁹⁹ Brownsword, p. 25.

¹⁰⁰ Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', p. 25 (n 87).

4. The beneficial effects of a good faith doctrine go beyond (reactive) dispute-settlement, for a good faith contractual environment has the potential to give contracting parties greater security and, thus, greater flexibility about the ways in which they are prepared to do business.¹⁰¹

It seems that the judicial opposition to good faith has faded over the years and the courts have on several occasions demonstrated some leniency towards the existence of a general doctrine in English contract law. This shift in the courts' attitude may suggest that English contract law will eventually come to accept the existence of a general duty of good faith in contracting especially with the influence of international restatements of contract law.¹⁰² Some commentators go as far as pointing out that the question of the desirability of good faith in English law will be replaced with other questions relating to its meaning, impact on existing rules and scope, and whether it should also be applied to cover pre-contractual dealings?¹⁰³

While the courts were reluctant to recognize such a general principle, important changes took place as a result of the EU Council's legislative intervention which saw good faith becoming part of United Kingdom law with the transposition of the Directive. The Directive was implemented through the UTCCR which established the test of unfairness, *inter alia*, on good faith.¹⁰⁴ According to Regulation 5(1), a contractual term is unfair if it is "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

¹⁰¹ Roger Brownsword., pp. 26–32. Some authors add another reason for the adoption of a doctrine of good faith, namely that it is a mandatory part of international conventions on contract law, such as the Vienna Convention for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts, which expressly refers to good faith and fair dealing; Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2005), p. 561

¹⁰² Ewan McKendrick, p. 563. In addition, see, for example, the decisions in the following cases, *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459; *Philips Electronique Grand Publique SA v British Sky Broadcasting Ltd* [1995] EMLR 472; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 *Build LR* 42; *Re Debtors* (Nos 4449 and 4450 of 1998) [1999] 1 All ER (Comm) 149; *Haines v Carter* [2002] UKPC 49.

¹⁰³ McKendrick, *ibid*.

¹⁰⁴ The Regulations of 1994 were revoked and replaced with the UTCCR.

Interestingly, there is no reference in English law prior to the implementation of the Directive as to the meaning of the requirement of good faith in the context of consumer contracts. The inclusion of good faith in the UTCCR raised conceptual problems and stirred debate in English law because it introduced an alien concept of a civil law system nature into English law.¹⁰⁵ The Directive has been immensely influenced by the German *AGB-Gesetz* which used the judicially developed concept of good faith as a foundation to control unfair contract terms.¹⁰⁶ This led some writers to describe the reference to good faith in the Directive as "no more than a bow in the direction of these origins".¹⁰⁷

Therefore, while the concept of good faith is clear in German law, what does it mean in the context of consumer contracts in English law?

The most significant interpretation of the requirement of good faith comes from Lord Bingham in *Director General of Fair Trading v First National Bank* who equated good faith with the notion of fair and open dealing:

"The requirement of good faith in this context is one of fair and open dealing. *Openness* [emphasis added] requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. 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 Schedule 2 of the regulations".¹⁰⁸

¹⁰⁵ Joseph Chitty and Hugh Beale, para 15-045.

¹⁰⁶ Chris Willett, p. 79; Paolisa Nebbia, pp. 143-144.

¹⁰⁷ Joseph Chitty and Hugh Beale, para 15-045

¹⁰⁸ Para 17.

Lord Bingham made two additional important remarks relating to good faith: first, he pointed out that good faith was not a homogeneous concept in the Member States of the EU. Therefore, the differences between common law and civil law systems were sometimes overstated. Second, he noted that good faith was not a concept that was wholly unfamiliar to British lawyers, describing Lord Mansfield as its champion. Therefore, it should not pose any particular challenges when articulating its connotations.¹⁰⁹ Another important statement was made by Lord Steyn who referred to good faith as an "objective criterion" which imports open and fair dealing,¹¹⁰ and declined to confine good faith to procedural defects in negotiating procedures: "Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected".¹¹¹ In contrast, good faith should also be interpreted in a substantive sense that involves the "overall evaluation of interests involved".¹¹² Lord Hope, in his speech, acknowledged that the Directive "provides all the guidance that is needed as to its application".¹¹³ Therefore, the Directive explains in recital 16 that in making an assessment of good faith, the legitimate interests of the consumer should be taken into consideration.¹¹⁴ Good faith in this sense imposes positive obligations on the seller to respect the "legitimate interests" of the consumer.¹¹⁵

The debate between the opponents and proponents remains unresolved but it seems that it is only a matter of time until a general principle of good faith becomes part of English law due to legislative developments at the EU level, especially in the Principles of European Contract Law (PECL) which contain a general principle of good faith and fair

¹⁰⁹ Ibid.

¹¹⁰ Para 36.

¹¹¹ Ibid.

¹¹² Recital 16 of the Directive.

¹¹³ Para 45.

¹¹⁴ "In making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas 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".

¹¹⁵ Also see Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in *Good Faith and Fault in Contract Law* (Oxford University Press 1995), p. 245.

dealing in Art. 1:201(1)¹¹⁶ and will form the basis of a Common Frame of Reference on European Contract Law.¹¹⁷

1.3.1.3 Good faith in French law

Unfair terms in France were regulated for the first time in 1978 in law nos 78–23 of 10 January 1978 on the protection and consumer information of products and services,¹¹⁸ commonly referred to as *la loi Scrivener*. Prior to the introduction of the law, the courts resorted to general notions in contract law mechanisms to control unfair terms such as *d'ordre public*¹¹⁹ and *contra proferentem*.¹²⁰ The control system as established by the 1978 law was slow in its assessment process, ineffective and futile. It created an administrative body (i.e., *Commission des Clauses Abusives*) with the advisory task to make non-compulsory recommendations to the government that could subsequently issue decrees to forbid, limit or regulate the use of certain contractual terms that the commission found unreasonable in contracts concluded between professionals and non-professionals or consumers.¹²¹ The commission made 20 recommendations in nine years, with only one recommendation becoming an enforceable decree. However, its most significant part was annulled when the *Conseil d'État* reviewed it.¹²²

¹¹⁶ " Each party must act in accordance with good faith and fair dealing", available at:

<http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>

¹¹⁷ Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversis in Law* (Routledge-Cavendish 2008), p. 137

¹¹⁸ *Loi n° 78-23 du 10 janvier 1978 Sur la protection et l'information des consommateurs de produits et de services*.

¹¹⁹ Simon Whittaker, 'Assessing the Fairness of Contract Terms : the parties' "essential bargain", its regulatory context and the significance of the requirement of good faith' 12 Z Eu P 75, p. 87.

¹²⁰ Martin Vranken, *Fundamentals of European civil law and impact of the European Community* (Blackstone 1997), p. 117. Some French legal scholars suggested that even in the absence of a direct control system, the civil code contained legal concepts that could be used as basis to restore the contractual equilibrium, such as obligation without a cause Art. 1131(1), *laesio enormis* Art. 1118; execution of contract in good faith Art. 1134; and the judicially developed theory of *abus de droit*, Jean Calais-Auloy and Henri Temple, *Droit de la Consommation* (8 edn, Dalloz 2010), p. 208 *et seq.*

¹²¹ Hugh Beale and others, p. 790; Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers, p. 209.

¹²² E. H. Hondius, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht 1987), p. 175.

One of the main characteristics of the law is that it used dual threshold criteria to determine the unfairness of a contractual term: (i) abuse of an economic power by a professional (*abus de la puissance économique*) and (ii) receipt of an excessive advantage (*avantage excessif*).¹²³

Some have suggested that the *loi Scrivener* 1978 is rooted in, and derived from, the theory of abuse of rights (*abus de droit*) and the terminology of the French term, *les clauses abusives*, in itself demonstrates this inspiration clearly.¹²⁴ The aim of the *loi Scrivener* was to protect consumers from the abusive contractual behaviour of professionals by means of the contract of adhesion. French legislators conceived that professionals were abusing their factual position through the imposition of lengthy standard contracts on consumers who typically did not read what they accepted as terms of an agreement. Therefore, these professionals were abusing their contractual rights.

The definition of *unfairness* as laid down by the *loi Scrivener* took a subjective approach and focused on the professional since the term must have been imposed on the consumer by an abuse of the professional's economic power with the intention to receive an excessive advantage. The legislators witnessed a development in 1993 where the provisions of the *loi Scrivener* were transferred to a fresh consumer code, the *Code de la Consommation*, which consolidated all consumer protection legislation into one code. The new code did not alter the French approach to unfairness and the provisions on unfair terms remained as constituting articles L-132.1 to L-132.5 of the new code. However, a major turning point occurred in 1995 with the transposition of the Directive.¹²⁵ The criteria for assessment of unfairness as laid down by the *loi Scrivener* changed with the amendment of the consumer code to implement the Directive and its definition of

¹²³ Art. 35 of the law of 10 January 1978 provides that a contractual terms becomes unfair "when such terms seem to be imposed on non-professionals or consumers by an abuse of the other party's economic power and give him an excessive advantage".

¹²⁴ Abbas Karimi, *Les Clauses Abusives et la Théorie de L'abus de Droit* (Librairie Générale de Droit et de Jurisprudence 2001), p. 196; Simon Whittaker, p. 87 note 59; Reinhard Zimmermann and Simon Whittaker, p. 36

¹²⁵ *Loi n° 95-96* of 1 February 1995.

unfairness whereby two requirements must be met in order for a term to be qualified as unfair: (i) it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, and (ii) it was imposed on the consumer in a manner contrary to the requirement of good faith.¹²⁶ Although the transposition of the Directive into the French national law aims to reflect the terminology of the Directive and its notion of unfairness, the code did not fully embrace the European definition of unfairness verbatim and the French legislature preferred to abandon the reference in the Directive to the principle of good faith.¹²⁷ Art. L132-1 of the *Code de la Consommation* provides as follows:

"Any clause in a contract concluded between a seller or a supplier and a person who is not acting in the course of his trade, business or profession or a consumer shall be regarded as unfair if its object or effect is to create, to the detriment of that person or consumer, a *significant imbalance* [emphasis added] in the rights and obligations of the parties to the contract".

The present wording of this provision suggests that the test to assess contractual fairness in French law is now based exclusively on the notion of significant imbalance (*déséquilibre significatif*) between the rights and obligations of the parties to the contract. The new wording of the test is far better than the old one because a significant contractual imbalance does not always imply an excessive advantage to the professional. Thus, it is in more accord with the position of the consumer.

¹²⁶ Art. 3(1) of the Directive reads : "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

¹²⁷ France was not the only state to implement the Directive without reference to the criterion of good faith. Belgium, Austria, Luxembourg, Finland, Greece and the Netherlands limited their unfairness test to the notion of significant imbalance, Jules Stuyck, 'Unfair Terms' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), pp. 123–124.

However, the removal of the requirement of abuse of economic power is relatively insignificant, as the French notion of fairness still depends on the theory of abuse of right. A decision from the Cour de cassation expressly confirmed the relationship between abuse of rights and standard contracts (*contrat d'adhésion*), and held that the use of standard form contracts itself constitutes an abuse of economic power.¹²⁸ Therefore, despite the legislative changes, it seems that the theory of abuse of rights still constitutes the foundation of unfairness in French contract law as supported by Art. 1134(3) of the Code Civil, which provides that contracts must be performed in good faith.¹²⁹

It can be said that the new definition as imposed by the Directive influenced the French approach to define unfairness at least in one respect. It moved away from a concept focusing on the professional who abuses his economic position to a concept focusing on the impact of the term on the contractual position of the weak party – the consumer – and whether it had a detrimental effect on his rights arising from the contract.

A further observation that can be made is that the present notion of contractual fairness in French law is unique, and falls somewhat between the fairness notions in Germany and the UK. Although Art. 3(1) of the Directive uses good faith as one of the criteria to assess the fairness of a term, interestingly, the French legislature reduced the assessment criteria and deliberately opted to abandon reference to good faith, even though the principle of good faith is an overriding concept in the Code Civil that obliges all parties to perform their contractual obligations in accordance with it. In contrast, the German law, in section 307(1) of the BGB, places significant emphasis on good faith as a test for reasonableness of content and regards a standard term to be ineffective if it unreasonably disadvantages the other party contrary to the requirement of good faith.¹³⁰ In the UK the

¹²⁸ Cass civ (1), 6 January 1994.

¹²⁹ Art. 1134(3) of the French Civil Code states: '*Elles doivent être exécutées de bonne foi*'; see also Reinhard Zimmermann and Simon Whittaker, p. 35.

¹³⁰ "Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible". The translation of this provision is available at http://www.gesetze-im-internet.de/englisch_bgb

requirement of good faith was enacted for the first time and Art. 3(1) of the Directive was incorporated into English law word for word into the UTCC 1994,¹³¹ despite the fact that the concept of good faith is almost alien to English contract law.

So what could possibly be the reason for omitting good faith from the transposed French legislation?

The removal of good faith in the French text can be explained on the basis of the existing general requirement to perform contracts in good faith found in Art. 1134(3). The requirement has already been satisfied and there is no need to repeat it. In addition, it is generally accepted in French law that the professional cannot be acting in good faith if he seeks to achieve significant imbalance.¹³² It is also said that good faith is a vague concept and does not provide any additional value to the text.¹³³ Some French scholars point out that the lack of reference to good faith in the *Code de la Consommation* is perfectly understandable because it would add an element of uncertainty to the definition of unfairness and also has been said to be unnecessary because disproportionate advantage is always achieved when acting contrary to good faith.¹³⁴ A similar view is put forward by Calais-Auloy who suggests that the requirement of good faith exists in the background of various rules of the consumer code and argues that it is a too vague a concept to be applied alone by the judges.¹³⁵ He holds that Art. 3(1) of the Directive can be interpreted in two ways. First, the article contains two criteria that have to be fulfilled in order to qualify a term as unfair: (i) an objective criterion concerned with the significant imbalance the term creates and (ii) a subjective criterion in which a duty of good faith is breached. The second

¹³¹ Repealed and replaced with the UTCCR. In most respects, the 1999 regulations are the same as their 1994 predecessors; the main changes are related to the wording of the regulations, which are now closer to the wording of the Directive on unfair terms and other institutions can enforce the law beside the Office of Fair Trading (hereinafter OFT).

¹³² Joseph Chitty and Hugh Beale, para 15045.

¹³³ Hugh Beale and others, p. 817.

¹³⁴ Gilles Paisant, 'Les Clauses Abusives et la Présentation des Contrats dans la Loi n° 95-96 du 1er Février 1995' D Chron. p. 100; François Terré, Philippe Simler and Yves Lequette, *Droit civil: Les obligations* (9th edn, Dalloz 2005), No. 324 p. 332

¹³⁵ Jean Calais-Auloy, 'Le Devoir de se Comporter de Bonne Foi dans les Contrats de Consommation' in Stefan Grundmann and Denis Mazeaud (eds), *General Clauses and Standards in European Contract Law: Comparative Law* (Kluwer Law International 2006), pp. 192–193.

interpretation focuses solely on the significant imbalance and regards reference to good faith as a mere redundancy and not as an additional condition.¹³⁶

All in all, French contract law is impregnated with the principle of good faith which must be observed throughout the contractual process despite the fact that the wording of Art. 1134(3) of the French Civil Code confines its application to the performance of agreements. The French courts gave this provision a generous interpretation and distilled sub-duties from the principle of good faith, such as the duty to disclose information, the duty of loyalty and the duty to co-operate.¹³⁷ It is also regarded as a standard of proper contractual behaviour in the course of negotiations and could give rise to liability if one party suddenly decides to break off the negotiations.¹³⁸ Several years ago the French courts noticed the connection between good faith and the wrongful use of rights, and expanded the former to create the theory of abuse of rights to sanction the use of rights with an intention to harm others and when the exercise of the right was contrary to its social or economic purpose.¹³⁹ Therefore, unfair terms are considered a sub-category of abuse of rights.

1.3.2 The principle of good faith in contracts in the KCC: Notion and role

Under the contract theory in Kuwait, good faith occupies a central position, and seems to be an overriding principle in the formation and performance of contracts and tantamount to a very strong general rule that governs every contractual relationship.¹⁴⁰ Reference to good faith appears 32 times in the code, making it one of the fundamental concepts in the civil

¹³⁶ Ibid., p. 192

¹³⁷ François Terré, Philippe Simler and Yves Lequette, p. 442; Martijn Hesselink, p. 475, Clarisse Girot, *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kluwer Law International 2001), p. 29

¹³⁸ John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (Oxford University Press 2008), pp. 305–306; Bénédicte Fauvarque-Cosson, Denis Mazeaud and Jean-Baptiste Racine, *European Contract Law: Materials for a Common Frame of Reference* (Sellier 2008), p. 525

¹³⁹ Reinhard Zimmermann and Simon Whittaker, p. 34.

¹⁴⁰ Ibrahim Abu Allail, p. 293; Abd-Alrazzaq Al-Sanhuri, p. 848. It seems that good faith affects the entire area of private law, whether directly or indirectly, and touches on many areas such as, property law, contracts, tort, obligations, bankruptcy law and company law.

law of Kuwait. However, the difficulty with good faith is that its exact meaning is amorphous and too abstract. A closer examination of the code text reveals that the code seems to distinguish between two types of good faith, namely (i) subjective good faith and (ii) objective good faith. Subjective good faith is concerned with the contracting party's inner state of mind or knowledge and belongs to property law where the law protects the good faith possessor or good faith purchaser of property.¹⁴¹ Objective good faith, however, is mainly relevant to contract law. It is an external norm that imposes a standard of behaviour to which all contractual conduct must conform.¹⁴² However, the distinction is not sound and the two meanings tend to overlap in the code.

1.3.2.1 The notion of good faith in the KCC

It is unfortunate that the code does not provide a definition of the principle of good faith. Its meaning is surrounded by ambiguity and uncertainty due to its flexibility to serve the function for which it is assigned. Nonetheless, good faith can be analysed into two elements, (i) a negative element and (ii) a positive element. While the negative aspect of good faith requires each party to respect the interests of his counterpart and abstain from attempting any activity contrary to his reasonable expectation, positive good faith seems to impose a duty on each party to act and pursue their mutual benefit. The positive aspect sets good faith as a rule of conduct and ties it, although not very clearly, to notions such as of loyalty and co-operation where each party has to protect the interests of the other.¹⁴³ In

¹⁴¹ Art. 914.

¹⁴² It is worthwhile mentioning that some jurisdictions, such as in Germany and Italy, make a distinction between the two meanings, while in other, such as France, the distinction is not usually made. In the English legal tradition the concept of objective good faith is not recognised and was introduced after the implementation of the Directive. For further details, see Martijn Hesselinkp. 471 *et seq.*

¹⁴³ Abd-Alrazzaq Al-Sanhuri, p. 849, Ibrahim Abu Allail, p. 394. Arab jurists seem to have been influenced by the French notion of good faith where it has become generally accepted in French case law that good faith in performance engenders two sub-obligations: duty of loyalty and duty of cooperation. For the similarities between the two positions, see Abd-Alrazzaq Al-Sanhuri, *ibid.*, and John Bell, Sophie Boyron and Simon Whittaker p. 333. Good faith in the KCC even relaxes the notion of privity of contract and extends it in some cases to protect persons outside the contractual relationship such as a third party who acts in good faith, (e.g. Art. 519).

some instances the code recognizes the significance of good faith through its antonym: bad faith, to measure the extent of the parties' compliance with, and respect for, the agreement.¹⁴⁴ In addition, the duty of good faith is sometimes required even prior to contract formation, even though it is not distinctively articulated in the code. In an insurance contract, for instance, the insured person has a duty to disclose all factual information about the risk he is insuring against and refrain from holding any vital information necessary to the conclusion of the contract¹⁴⁵. Failure to comply with this obligation will result in the termination of the insurance contract and holding the insurer liable for any loss it causes. Some authors suggest that the pre-contractual duty to negotiate in good faith is not limited to insurance contracts and is applicable in all contracts. Therefore, if a party breaks off the negotiations without a valid reason, then he will be delictually liable to compensate the other party for the loss or expenses incurred as such conduct violates the trust and honesty that should prevail in relations, and hinders the legal and economic function of negotiations.¹⁴⁶

¹⁴⁴ For instance, Art. 159 pertaining to exploitation as a defect of consent assumes that whenever a party exploits a weakness in another to induce him into a contract then it is always done so in bad faith. Similarly, if a party employs deceptive means or artifices to obtain consent then he always acts in bad faith (articles 151–152). Moreover, the debtor might be liable even for unexpected damages arising from his bad faith behaviour if he committed deceit or his action amounts to gross misconduct (Art. 300). The same goes with the doctrine of abuse of right in the case when someone abuses his right to inflict damage upon another person then it is assumed that his use of right was performed in bad faith (Art. 30.2).

¹⁴⁵ The articulation of the obligation to negotiate in good faith is attributed to the German jurist Rudolf von Jhering who wrote a paper in 1861 entitled '*Culpa in Contrahendo oder Schadensersatz bei Nichtigen oder Nicht zur Perfection Gelangten Verträgen*'. His paper had far-reaching impact well beyond his intentions, and influenced many legal systems such as, France, Italy, Austria and Switzerland, for further details, see Friedrich Kessler and Edith Fine, '*Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*', (1964) 77 HarvLRev 401, p. 401 *et seq.* Jhering's ideas influenced many Arab jurists, see *infra*.

¹⁴⁶ Abdulhay Hejazi, *The General Theory of Obligations According to the Kuwaiti Law: A Comparative Study*, vol 1 (Kuwait University Press 1982) (in Arabic), p. 595. Hejazi describes the loss incurred due to broken negotiations when a party violates his pre-contractual duty of good faith as "negative loss" and the injured party has the right to claim compensation on the grounds of what Hajazi calls a "negative contractual interest" as opposed to "positive contractual interest" which entitles a contractual party to seek damages in case of non-performance or defective performance, pp. 595–596.

1.3.2.2 *The role of good faith*

The central role of good faith in the contract theory under the KCC is set out in Art. 193 concerning Contract Interpretation (construction), Art. 195 concerning the Content of the Contract (determination) and Art. 197 concerning Contract Performance (implementation).

i. Good faith as a rule of construction

Good faith appears in the context of contract interpretation in Art. 193(2) and functions as a criterion to facilitate interpretation when the contract terms are unclear. Art. 193(2) provides that if there is room for interpretation of the contract, the court must seek to determine the common intention of the parties rather than adhering to the literal meanings of the words, taking into account the nature of dealing, current customs, and good faith and honourable dealing. Accordingly, the court will have to adopt a subjective interpretation where intention prevails over expression to ascertain the meaning of the contract words and the purpose of the agreement to reveal the contractual content through the use of, *inter alia*, good faith to see how a reasonable person would understand the terms. In addition, good faith could play a completive function. The courts may exercise their discretionary power and apply a "suppletive" interpretation to fill the gaps and create new obligations not initially included in the contract but that can be implicitly deduced from the nature of the contract, such as the transporter obligation of the safety of his passengers.¹⁴⁷

¹⁴⁷ Ibrahim Abu Allail, p. 251. It is worthwhile mentioning that ambiguous unfair terms should always be construed in favour of the adhering party in contracts of adhesion under the Kuwaiti Civil Code. The code here deviates from the general rule in contract interpretation in which ambiguous terms should be interpreted in favour of the debtor, see articles 194 and 82.

ii. Good faith as a criterion for contract scope determination

Good faith can play an important role in determining the scope of the contract and dictates certain obligations that are not included in the contract. Art. 195 states that determination of the subject matter of the contract shall not only be limited to the stipulations contained therein or the legal provisions governing the contract, but also what is deemed to be a requirement of the contract. To assess what can be a requirement of the contract, the code specifies four criteria that can be taken into account: (i) custom prevailing, (ii) rules of equity, (iii) nature of dealing, and (iv) good faith and fair dealing. Therefore, if the contract is a contract for construction, the contractor has to act in good faith and use the construction materials sparingly even if the contract does not expressly refer to this obligation. Good faith here plays a supplementary role, and extends the duties of the parties and obliges them to execute the contract in a loyal and co-operative way in order to bring the execution of the contract to a good end. The rationale behind the inclusion of these four criteria is that they allow the court to find and enforce implied obligations that were not initially included in the contract.¹⁴⁸

iii. Good faith as a rule of implementation

Art. 197 reads: "The contract must be performed in accordance with the stipulations contained therein and in a manner which is consistent with the requirement of good faith and honourable dealing". This article is important because it explains how each party should perform its contractual obligations and dictates that they have to execute their obligations as prescribed by the terms of the contract and in accordance with the principle of good faith. It reinforces the principle of *pacta sunt servanda* as declared by Art. 196 and imposes a moral obligation on the parties to act in good faith in accordance with

¹⁴⁸ Compare, Egyptian Civil Code Art. 148.2 and the French Civil Code Art. 1135

reasonable standards of fair dealing. The text indicates that each party has to take into consideration the welfare of the other when executing his obligations, and maintain the trust and expectations arising out of the contractual relationship.¹⁴⁹ Therefore, if the contract is a contract of transport, then the transporter must perform his obligation in good faith, and take the shortest and safest route. Similarly, good faith entails that the creditor does not abuse his right to enforcement if an honest debtor is unable to fulfil his undertaking on time and award him an additional period for performance until an acceptable date in exceptional circumstances.¹⁵⁰ Good faith in this sense imposes a standard of behaviour that has to be maintained by the parties throughout the life of the contract.

However, it should be noted that although the wording of Art. 197 confines the performance of obligations in good faith to the post-conclusion phase of the contract, it does not necessarily mean that acting in good faith is not required in the pre-contractual stage because lack of good faith (bad faith) is always wrongful behaviour and automatically gives rise to liability. The Commercial Circuit of the Court of Cassation¹⁵¹ in Kuwait held:

"The rule that provides that deceit (in the sense of acting in bad faith) invalidates all acts is a well-founded rule even if it has not been embodied in the code. This is because it is based on moral and social considerations aiming at fighting deception, fraud and any deviation from the requirement of good faith that must exist in all sorts of conduct for the benefit of individuals and society . . . and if the

¹⁴⁹ Ibrahim Abu Allail, p. 293.

¹⁵⁰ Ibid., p. 294.

¹⁵¹ The Court of Cassation, which acts and is considered as a Supreme Court, is the third and final stage of litigation. However, this court acts as a supervisory body.

trial court concludes that deceit exists, it is entitled to invalidate any act found to be contrary to the requirement of good faith".¹⁵²

1.3.2.3 The relation between good faith and unfair terms in the KCC

It seems the reason behind the inclusion of the principle of good faith in the code is to moralize agreements, and to ensure that they fulfil a social function and not merely serve the needs of one party at the expense of the other. In addition, good faith can be seen as a judicial instrument that enables the courts to justify intervention to sanction dishonest conduct and to amend agreements according to their view. However, although it is theoretically conceivable that the principle of good faith as articulated in the code can be broadened to control all sorts of contractual unfairness, it is doubtful that it could play such a far-reaching role and be realistically applied to sanction unfair terms in consumer contracts. This is due to the fact that the notion of good faith in the KCC remains vague, which requires further development and concretization. In other jurisdictions such as Germany, France and Belgium, the courts have successfully given clarity to the notion of good faith, and cumulatively established rules and precedents relating to its meaning and function, particularly in Germany, over several decades.¹⁵³ It is unlikely that the same will be replicated in Kuwait as the courts view the law in terms of provisions and articles, and place less emphasis on general principles and abstract notions. Moreover, some scholars have noticed that the Kuwaiti courts have a strong inclination to apply the rules and interpret them in a strict manner.¹⁵⁴ Thus, this would suggest that they reject the notion of extending the application and interpretation of the principle of good faith in favour of the doctrine of sanctity of contract as articulated in Art. 196.

¹⁵² Cass. Comm. 95/1995.

¹⁵³ See the discussion in Martijn Hesselink (n 64).

¹⁵⁴ Jamal Al-Nakkas, pp. 62-68.

Furthermore, good faith in its present form is not an independent or autonomous legal concept that can be used on its own to achieve contractual balance. Indeed, a look at the laws of other jurisdictions indicates that they use a combination of criteria to determine unfairness. In Germany, for instance, section 307 of the BGB provides that a term would be unfair if it breaches good faith and places the weak party at an "unreasonable disadvantage". In the UK Regulation 5.1 of the UTCCR provides that a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a "significant imbalance" in the parties' rights and obligations. The French *Code de la Consommation* uses a similar criterion and regards a contractual clause to be unfair if it causes a "significant imbalance" between the rights and obligations of parties to the contract (Art. 132-1). Therefore, good faith alone is not a sufficient ground to assess fairness and the courts will need to employ another element of a substantive nature besides good faith to determine and measure contractual fairness because "good faith remains a hazy notion, which is expressed effectively only when it runs into the legal mould of other concepts with more precise contents".¹⁵⁵

1.4 Conclusion

The discussion in this chapter shows that although the general principles of contract theory and defects of consent can, from a pure theoretical perspective, be used to avoid unfair terms in consumer contracts, their outcome might not always satisfy the consumer as the result would normally be not only to eliminate the unfair term, but to dissolve the whole contractual relationship; a result that might not be in the consumer's best interest. That would be the case, on the one hand. On the other hand, given the restrictive interpretation approach that the Kuwait courts adopt, it is highly unlikely that the courts will relax the interpretation of the text of the general contract law principles in favour of consumers.

¹⁵⁵ Reinhard Zimmermann and Simon Whittaker, p. 38.

The discussion also sought to determine whether an overarching contract law principle such as good faith can be used to eliminate unfair terms. Although good faith has been used alone effectively in some jurisdictions (e.g., Germany and Portugal) to eliminate unfair terms, it is doubtful that the same can be replicated in Kuwait for two reasons. First, good faith remains an undeveloped moral principle and is not yet an autonomous criterion that can be employed on its own to control the content of a contract. Second, as the above discussion shows, the main function of good faith is to play a role in the performance stage of the contract rather than in the formation stage where the unfair terms are inserted. This supports the researcher's argument for the need for law reform on two particular fronts: (i) the introduction of a general concept of contractual unfairness in the KCC that covers all contractual relations, and (ii) the creation of a new set of rules that are aimed at strengthening the consumer's weak contractual position in relation to the professional.

Chapter Two: Adhesion Contracts and Unfair Terms: Review of the Current Scope of Protection

2.1 Introduction

Contractual unfairness is closely tied to contracts of adhesion because they are the vehicle of choice for imposing unfair terms on weak and vulnerable parties. Any treatment of the control system of unfair terms in Kuwait requires an assessment of the regulation of adhesion contracts in the KCC as regulated in articles 80–82 relating to contract of adhesion. The researcher believes the existing control regime of unfair terms has failed considerably in providing an acceptable level of protection against unfair terms. The reasons for this failure can be attributed to several factors, including the restrictive scope of protection the courts have consistently given to adhesion contracts, the insufficiency of rules in providing adequate protection to the adhering party prior to the conclusion of the contract, the vagueness of the test of unfairness in the code, and the inefficiency of the judicial control rules. The aim of this chapter is to examine the first two. Discussion of the third and fourth factors will be dealt with in later chapters.

This chapter is divided into five sections. Section one is this introduction. Section two provides an historical background to the development of adhesion contracts to understand the context in which they evolved. The third section discusses the procedural aspect of adhesion contracts to explain its associated problems, specifically that of informed consent, and an attempt is made to propose solutions to enhance the consumer's consent and his contractual position prior to the conclusion of the contract. The fourth section deals with the prevailing concept of adhesion contracts as adopted by the courts and legal scholars, and explains why the researcher believes that the present concept of adhesion contracts needs to be reconceptualized. The chapter ends with a conclusion.

2.2 Origin and concept of the contract of adhesion

In the heydays of *laissez-faire* the doctrines of autonomy of the will and freedom of contract were paramount and dominated classical legal belief. The two concepts presume that the contracting parties stand on equal footing and possess similar bargaining power. The principle of freedom of contract implies that individuals are free not merely to choose the other party of the contract, but are also able to determine the content and terms of their agreement by making choices that are consistent with their preferences.¹⁵⁶ What was agreed between two free individuals was deemed just and fair according to the principles of private autonomy and free consent.¹⁵⁷

Therefore, the contract is the law of the parties within the framework of statutory and case law and its binding force is derived from their mutual, common contracting will. The will theory asserts that the wills of the parties become one common will once the contract is formed. Hence, their contractual obligations are self-imposed. It is for this reason that no party can unilaterally modify the terms of a contract without the acceptance of the other because this would simply undermine their contracting will. The will theory also implies that it is inconceivable, in theory at least, for a party to conclude a contract contrary to his interests and against his will.¹⁵⁸

The legal ideology of contract law was determined by the prevalent contracting pattern of society. The spirit of the doctrine of *laissez-faire* was predominant in the nineteenth century and interference with the results of the market forces was strenuously opposed by the courts. Sir George Jessel MR, who defended the institution of private contract, described the prevailing judicial attitude and stated:

¹⁵⁶ Vera Bolgar, 'The Contract of Adhesion: A Comparison of Theory and Practice' 20 AmJCompL 53, 56.

¹⁵⁷ Ibrahim Abu Allail, p. 50

¹⁵⁸ See Atiyah's discussion of the will theory, pp. 405–408; Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press 2007), p. 15.

"If there is one thing more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract".¹⁵⁹

Contracts were viewed as an exclusive private matter between individuals and the courts were not allowed to interfere in non-substantive matters as this would contravene the legitimate interests of the public.¹⁶⁰ This judicial attitude was not limited to the UK. In the US too, the Supreme Court refused to endorse statutory restrictions on contracts, and invalidated economic regulations on minimum wage and maximum working hours as they interfered with liberty and property and would alter the free-market order.¹⁶¹ The legislative and judicial non-interventionism in the economic field was an application of the public policy influenced by the *laissez-faire* doctrine which privileged individuals' rights over societal rights.¹⁶²

However, the massive advancement in the methods of production and distribution that markets witnessed towards the end of the nineteenth century and at the beginning of the twentieth century gave rise to a new contractual paradigm based not on individual negotiation, but on the basis of adherence.¹⁶³ The emergence of the new paradigm rebutted

¹⁵⁹ *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq. 462 at 465.

¹⁶⁰ Andrew Burgess, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' 15 *Anglo-AmLR* 255, 256; Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (Cambridge University Press 2001), p. 8. The public policy with the establishment of the welfare state shifted towards a more interventionist role of the government and the individuals rights transformed into social values. States began to recognize the social change and introduced social legislations that provided protection for weak and vulnerable parties, Vera Bolgar (n 156), p. 57.

¹⁶¹ See for instance, *Lochner v New York*, 198 U.S. 45 (1905); *Coppage v Kansas*, 236 US 1, 27 (1915).

¹⁶² Vera Bolgar (n 156), p. 57.

¹⁶³ There is a plethora of legal literature in the US and Europe on contracts of adhesion and their development since the first decade of the last century. Although they discuss contracts of adhesion from an American or European perspectives, their theoretical analysis and argument is not limited to a certain jurisdiction and can be used to illustrate and provide a systematic presentation of the problem in Kuwait. See generally Friedrich Kessler, 'Contracts of Adhesion - Some Thoughts About Freedom of Contract' 43 *ColumLRev* 629; Todd D

and proved the fallacy of the presumption of individuals' equality and freedom of choice.¹⁶⁴ Business firms began to standardize their terms of business in the form of adhesion contracts to satisfy the growing demand and use them in every transaction with the same product or service. The widespread use of adhesion contracts allowed powerful enterprises to realize their substantial advantages, particularly in the elimination of negotiation cost and the allocation of risk. The result was that the individuality of the parties has faded away and consumer autonomy has been reduced to the decision of whether or not he accepts the standard contract.

The deterioration of private autonomy and the rise of a novel contractual paradigm led some legal jurists to question their legality and whether they should be regarded real contracts. The French jurist Saleilles was probably the first academic to discuss the new paradigm and coined the term 'contract of adhesion' in his seminal work *De la déclaration de volonté*¹⁶⁵ in the course of his discussion of party autonomy in the German Civil Code. In his analysis, Saleilles drew an important distinction between the conventional contract and another type of contract which he called, for lack of a better term, 'contract of adhesion'.¹⁶⁶ He addressed contracts of adhesion in the context of his discussion of section 133 of the German code, which pertains to the rules governing the judicial interpretation of a declaration of the will. Saleilles noted that the ordinary contract represented unification of the contracting parties' wills and, in interpreting contracts, the court had to look at the parties' unified will to determine the meaning of the terms. However, if the will of one party exclusively dominated and dictated the terms, then the

Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' 96 HarvLRev 1173; Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 2003); Guido Alpa, 'Protection of Consumers against Unfair Contract Terms: Legislative Patterns of Controlling Adhesion Contracts in Europe' 15 Willamette LRev 267.

¹⁶⁴ Ruth Sefton-Green, 'Duties to Inform versus Party Autonomy: Reversing the Paradigm (from Free Consent to Informed Consent)?-A Comparative Account of French and English Law' in Howells Geraint, André Janssen and Reiner Schulze (eds), *Information Rights And Obligations: A Challenge For Party Autonomy And Transactional Fairness* (Ashgate 2005), p. 172; Friedrich Kessler, p. 631.

¹⁶⁵ Raymond Saleilles, *De la déclaration de volonté; contribution à l'étude de l'acte juridique dans le Code civil allemand (art. 116 à 144)* (F. Pichon 1901).

¹⁶⁶ Vera Bolgar (n 156), p. 53.

contract failed to embody the "unification of wills" premise and the court would not be able to ascertain the intention of the contractors because there was one will only.

Saleilles's viewpoint was that the adhesion contract was, in fact, a "unilateral declaration of intent", an *acte juridique*, and was more akin to legislation because it manifested the characteristics of a law of general application where the rules were dictated by a superior power (the state) and were addressed not to a single individual, but to a collective number of individuals.¹⁶⁷

Accordingly, to Saleilles, contracts of adhesion were an alien species to contract theory because they were the exclusive work of one party who alone imposed in advance, without discussion, his absolute and final will on the other. What distinguishes this unilateral act of will is that the will of the adhering party is not a constituent element of the contract; it is no more than a fulfilment of a condition of its execution. The ordinary principles of construction in Saleilles' view, therefore, was not able to ascertain the "unified will" because such contracts are contracts in name only¹⁶⁸; they are unilateral acts that lack consensus and are concluded in a manner contrary to the common rules in the law of contract which require concurrence of two wills. Both parties express their consent, but for one of them the consent is not voluntary because the terms of the contract are no longer the embodiment of discussion. He held that this called for a different method of contract construction that took into account the position of the weak party to interpret the terms in his favour.¹⁶⁹

One could challenge Saleilles's argument by stating that while it is true that the weak party is unable to discuss the terms of the contract, he remains free in the sense that he can always choose whom to contract with and above all, has an option not to enter into agreement at all. However, this argument is based on false assumptions and, hence, is

¹⁶⁷ Raymond Saleilles, pp. 229–230.

¹⁶⁸ Ibid.

¹⁶⁹ Arthur Von Mehren, 'A General View of Contract' in Arthur Von Mehren (ed), *International Encyclopedia of Comparative Law*, vol VII *Contracts in General* (JCP Mohr 1990), p. 15.

inconclusive for two reasons. First, most often the providers of these contracts control the market and offer the same product or service with substantially similar terms because they have already standardized the conditions for the supply of the product or service in the industry.¹⁷⁰ Second, the avenue of not to contract is merely theoretical because the necessities of life oblige individuals to accept the terms of adhesion contracts as laid down in advance by the large enterprises regardless of how harsh they are. Contracts such as, labour, electricity and transport contracts are indispensable for individuals because they depend on them for their living.

A contrasting view was expressed by the French legal philosopher Demogue who challenged Saleilles's anti-contract thesis and regarded the contract of adhesion as natural evolution and positive market practice because it enables individuals to arrange their private affairs in a more efficient and expedient manner. This form of contracting eliminates trade barriers and reduces the overall cost of transactions. He commented that "The legal systems of the western world, inspired largely by the wish to encourage business and the active life, have sought so to arrange the performance of juridical acts, and legal life in general, as to economize time to the utmost, thus making it easier for individuals to act and thereby to create wealth".¹⁷¹ In his view, this is an application of what he called the "law of the least effort". However, while it is true that contracts of adhesion play an important role in organising business practices, Demogue's pure economic treatment was criticized¹⁷² on the grounds that it failed to consider an important fact about of such contracts, namely that they were used by traders as a tool to oppress weak parties and impose unconscionable clauses.¹⁷³ He did not propose any legislative

¹⁷⁰ Friedrich Kessler (n 163), p. 632.

¹⁷¹ René Demogue, 'Analysis of Fundamental Notions' in Alfred Fouillée (ed), *Modern French legal philosophy* (Boston Book Co. 1916), p. 471.

¹⁷² Edwin W Patterson, 'The Interpretation and Construction of Contracts' 64 *ColumLRev* 833, p. 857.

¹⁷³ Lewis A Kornhauser, 'Unconscionability in Standard Forms' *CalifLRev* 1151, p. 1162. Kornhauser cited several cases to show that standard form contracts were used to impose exorbitant prices or oppressive clause.

solution to the problems posed by contracts of adhesion, but rather proposed an ongoing process of conciliation between conflicting parties.¹⁷⁴

It took some time for the term *adhesion contracts* to be introduced into Anglo-American legal vocabulary. The legal literature was initiated by Edwin Patterson in 1919¹⁷⁵ and was further expounded by Friedrich Kessler who presented an influential analysis of contracts of adhesion from an American perspective in a seminal article entitled ‘Contracts of Adhesion: Some Thoughts about Freedom of Contract’.¹⁷⁶

Kessler’s article is particularly important because it traces the roots of adhesion contracts back to the relationship between individuals and large enterprises, and explains the implications of this relationship for the entire social order.¹⁷⁷ In addition, it links the development of adhesion contracts with the evolution of the large-scale enterprise with its mass production and mass distribution, making the emergence of new types of contracts inevitable.¹⁷⁸

According to Kessler, adhesion contracts are unique because they are drafted unilaterally by the seller who possesses ‘unfettered discretion’ by virtue of his superior position resulting from a monopoly (natural or artificial) to dictate the terms of the agreement that best reflect his interest in which the consumer has ultimately involuntarily to adhere to. He further argues that even if the weaker party shops around for better terms, his effort will most likely fail because either the drafter controls the market or all its competitors use substantially similar terms. Thus, the consumer has no actual alternative and his contractual intention is but a "subjection more or less voluntary to terms dictated by the stronger party".¹⁷⁹

¹⁷⁴ René Demogue (n 170), 476–477.

¹⁷⁵ Edwin W Patterson, ‘The Delivery of a Life-Insurance Policy’ 33 HarvLRev 198.

¹⁷⁶ Cited above (n 163). Several treatments preceded Kessler’s article but his contribution was the first persuasive analysis and coherent presentation to the extent it defined the parameters of the discussion. See for instance; Karl N Llewellyn, ‘(Book review) The Standardization of Commercial Contracts in English and Continental Law’ 52 HarvLRev 700.

¹⁷⁷ Todd D Rakoff (n 163), pp. 1215–1216.

¹⁷⁸ Friedrich Kessler (n 163), p. 631.

¹⁷⁹ *Ibid.*, p. 632.

Some scholars have noticed that the classical rules of the law of contract were insufficient to protect weak parties against the unequal distribution of property in society and, therefore, these rules were futile in preventing the freedom of contract from being a one-sided privilege. Kessler, for example, pointed out that courts and commentators alike had failed to notice the emergence of a radically novel contractual order and wrongly sought solution in interpretation techniques to protect the weaker party. The result was that society had to bear the expensive cost of uncertainty for the preservation of an apparent homogeneity in the law of contract.¹⁸⁰ He further warned of their consequences and concluded: "standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals" and called for generating new legal principles to govern this modern model of contracting.¹⁸¹

Kessler's analysis has stimulated some commentators to identify the characteristics of contracts of adhesion to differentiate them from ordinary contracts. Lenhoff deduced, through extrapolation of American case law, that adhesion contracts have five main features. These five features can be summarised as follows:

- i. They are based on standardized forms.
- ii. The forms are used to satisfy mass demands for goods and services.
- iii. The forms are prepared for an indefinite number of individuals rather than to a single individual.
- iv. The forms are drafted by large-scale enterprises which possess superior bargaining power and are able to influence the market monopoly to a certain extent.

¹⁸⁰ Ibid., p. 633.

¹⁸¹ Ibid., p. 640.

- v. The individual consumer lacks bargaining power and his choice is limited to either adhering to the contract or rejecting it altogether.¹⁸²

A comparable characterization of contracts of adhesion was made in French jurisprudence focusing on the subjective elements of the agreement which encompasses the following features: (i) the offer is of a general nature and is continuous. It is addressed to the public and is maintained for an unlimited time; (ii) the offeror is in a monopolistic position whether legal or factual or at least has a major economic power, either by himself or by his union with similar businesses; (iii) the purpose of contract is the provision of goods or services that are sought by all individuals; (iv) the offer is presented in the form of a standard contract that embodies the general conditions and reflect the interests of a block of businesses; and (v) the contract includes a series of clauses all designed to benefit the offeror.¹⁸³

The above-mentioned characterization of contracts of adhesion merits a few observations. First, all contracts of adhesion are effectively standard form contracts but the opposite is not true. There are two types of standard-form contracts.¹⁸⁴ The first type is of ancient origin, and relates to contracts formulated and concluded between parties of relatively equal bargaining power, which clauses have been settled and adopted over the years by negotiation between traders to facilitate their business conduct. These are commercial standard-form contracts between traders, such as policies of insurance, bills of lading, and building contracts. The legality and enforceability of these contracts are not questionable as their terms are presumed to be fair and reasonable because they are the

¹⁸² Arthur Lenhoff, 'Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law' 36 *TullRev* 481, p. 481. Lenhoff's description of the characteristics of contracts of adhesion has been generally accepted by commentators; see Burgess, p. 257 and Alpa p. 269.

¹⁸³ Marcel Planiol and Georges Ripert, *Traite Pratique de Droit Civil Francais*, vol VI Obligations (Librairie Generale de Droit et de Jurisprudence 1952), pp. 136–137 ; for a third characterization, see Rakoff, p. 1177.

¹⁸⁴ This division has been made by Lord Diplock in *Schroeder Music Publishing Co. Ltd. v Macaulay* [1974] 1 W.L.R. 1308, 1316; Wilson adds a third group termed contractual dirigism which is "state of affairs in which certain terms of specified contracts are proscribed and others proscribed by legislation", Nicholas Wilson, 'Freedom of Contract and Adhesion Contracts' 14 *ICLQ* 172, p. 176.

outcome of negotiation and representation of the wills of multiple parties. In contrast, the second type is the consumer adhesion contract which is of relatively modern origin. It involves the provision of goods or services, and is concluded between an inferior consumer and a trader holding a strong bargaining position. The terms of the consumer contract have not been the subject of negotiation and the consumer role is reduced to accepting the contract as is or rejecting it as a whole.

The second standard form contract relates to the assumption that has been put forth by scholars such as Kessler and Lenhoff that contracts of adhesion exist in the absence of competitive markets and that the drafting party is abusing his monopolistic position, which is not entirely correct. The theoretical approach used by Kessler is based on what has been termed the "exploitation theory" which suggests that large enterprises tend to exploit their market power and abuse their right to contract by utilising standard form contracts as an instrument to maximize their benefits and to exclude any "irrational factor" in litigation.¹⁸⁵ Some scholars have criticized this thesis: Priest, for example, believes that Kessler's exploitation theory is outdated and was valid until the 1970s when there was no other coherent legal explanation for standard contracts and this seemed consistent with the market practices at that time.¹⁸⁶ Others contended that it was doubtful that there was an apparent relationship between bargaining position and the use of adhesion contracts. Instead, it was argued that empirical analysis showed no correlation between the use of standard contracts and bargaining power. Research indicates that standard contracts are used because the information cost for consumers is high and the ordinary consumer does not have the time to read the standard contract and, even if he does, it is most likely that he would not understand the terms of the contract.¹⁸⁷

¹⁸⁵ Friedrich Kessler (n 163), p 632.

¹⁸⁶ George L Priest, 'A Theory of the Consumer Product Warranty' 90 Yale LJ 1297, pp. 1299–1302.

¹⁸⁷ Hugh Beale, 'Inequality of Bargaining Power' 6 OJLS 123, p. 131; Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts', p. 233.

The third observation that can be made is that the lack of bargaining power in the form of absence of negotiation in adhesion contracts is not the underlying problem for the adhering party; rather, it is his inability to influence the terms of the contract. The drafting party may easily escape the effects of this condition and avoid judicial control by opening a window for negotiation for the adhering party and agreeing to discuss some terms or the non-core terms but eventually offer no real choice and prevent any alteration of the terms. Furthermore, negotiation may prove futile in sophisticated contracts where it is hard for the layman who lacks necessary knowledge be it technical or legal to genuinely comprehend and assimilate the nature of the terms and assess their possible consequences. Therefore, assigning a narrow meaning to negotiation may be meaningless and injure the interests of the adhering party. It is for this reason that the Directive, in Art. 3(2), and the UTCCR in Regulation 5(2) gave a broad meaning to negotiation. The negotiation must be real and the consumer must have been given a real opportunity to influence the substance of the term that was fixed prior to the negotiation.¹⁸⁸

2.2.1 The concept of adhesion contract in the KCC

In the Arab world the theory of adhesion contract was first introduced in the Egyptian Civil Code of 1949 in Art. 100, which was largely influenced by the prevailing theory of

¹⁸⁸ Art. 3(2) of the Directive states: "A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract". The wording of Regulation 5(2) is exactly the same. See also, Law Commission and Scottish Law Commission, *Unfair Terms in Contracts*, (A Joint Consultation Paper Law, Commission Consultation Paper no 166/Scottish Law Commission Discussion Paper no 119), (2) 2002, paras 4.42–4.54; Hugh Beale, 'Unfair Terms in Contracts: Proposals for Reform in the UK' 27 JCP 289, p. 293.

adhesion contract in France.¹⁸⁹ This article, in turn, influenced the drafters in other Arab states and was reflected in their civil codes.¹⁹⁰

However, the Arab version of the theory acquired a life of its own and transformed into a slightly different concept. This can be illustrated by the translation of the term *adhesion* itself. The term used in French Law is *contrat d'adhésion*, which can literally be translated as "affiliation contract" because it contains standard terms that are not open for discussion and the adhering party affiliates himself to the contract without argument. Nonetheless, the term was translated into Arabic to *idha'an*, which means acquiescence or submission, instead of affiliation (*indhemam*). The Arabic translation was first used by Al-Sanhuri who believed that his translation was more appropriate because it carried negative connotations as opposed to the positive term affiliation: "His [the adhering party's] consent exists but it is a compelled consent and for this reason these contracts were termed contracts of acquiescence (*idha'an*)".¹⁹¹

Thus, the notion of acceptance in adhesion contracts in Arab jurisprudence is associated with the notion of compulsion or coercion because the adhering party is seeking an essential product provided through a monopoly which does not allow room for contract discussion. The association of the notion of monopoly with essential product finds its roots in Islamic jurisprudence where Muslim jurists require the possession of an essential commodity by a trader in order to recognize the existence of a monopoly.¹⁹² Modern legal scholars seem to have been influenced by this understanding and sought to establish an

¹⁸⁹ This is apparent in the writings of Al-Sanhuri, the most prominent leading civil law jurist in the 20th century, who relied heavily on French theorists to formulate the Arabic version of the theory of adhesion contracts. See his *Middle Commentary*, pp. 293–301.

¹⁹⁰ See for example, Iraqi, Art. 167(1); Syrian, Art. 101, Libyan, Art. 100; Jordan, Art. 104; and Kuwait, Art. 80.

¹⁹¹ Abd-Alrazzaq Al-Sanhuri, p. 293. He further notes: this term has received wide acceptance in the legal language both judicially and jurisprudentially and therefore was incorporated into the new legislation (the Egyptian Civil Code), nt. 1, pp. 293–294. Prior to the promulgation of the 1949 Civil Code, some Egyptian courts used the term 'affiliation contract' instead, see for example, Damanhur District Court, Civ. No. 346/1946, 14/12/1946.

¹⁹² Mohammad Abdulthaher Hussain, *Introduction to Legal Studies: The Right Theory* (Cairo, Dar Annahdha 1996) (in Arabic), p. 50

Islamic basis for the notion of monopoly despite the difference in importance between the term in contemporary economics and in Islamic law.¹⁹³

2.2.2 The legal nature of adhesion contract in the KCC

Under the heading "Special forms of contracting",¹⁹⁴ Art. 80 KCC states: "The existence of the contract is not precluded if acceptance comes in the form of adherence of one party to the will of another by the delivery to a pre-drafted and non-negotiable model agreement prepared by the offeror".

The first observation that can be made here is that this article concedes that adhesion contracts are an aberration of the general rule in contract formation. It was mainly introduced to affirm the legal nature of adhesion contracts and to prevent any dispute that may arise as to their legal nature. The explanatory notes to the code provide:

"The code favours the correct view [the contractual idea] which has always been upheld by the courts and a plethora of jurists. It takes into consideration that although the adhering party is in a much weaker position, be it economic or social, than his counterpart and that his consent comes in the form of submission to the drafter's conditions and acquiescence to his will, the adhering party consent, nonetheless, does exist and is sufficient to form a valid contract. The abidance of

¹⁹³ Monopoly (*ihṭikar*) in Islamic Law (*fiqh*) means hoarding and arises when a trader collects and stores an essential commodity in anticipation for an increase in price. Islam forbids such practice and bans its formation because it inflicts harm on others and deprives them from availing of basic necessities. What constitutes a basic necessity is subject to dispute. There are three views regarding the issue. One view is that monopoly cannot arise except with respect to food. The second view adds clothes next to food and the third view holds that monopoly exist with respect to any commodity the people need which hoarding inflicts harm. See Hosni Abdeldayem, *Monopoly Contracts* (Alexandria, Dar Alfikr Al-Jamei 2008) (in Arabic), p. 127 *et seq.*

¹⁹⁴ The Civil Code enumerates five special form of contracting; preliminary contracts, promise to contract, earnest contract, auction contracts and adhesion contracts.

the adhering party without discussion cannot be remedied by rejecting the contractual idea; rather it is by protecting his weakness".¹⁹⁵

The main problem engendered by adhesion contracts is that they cast doubt on the quality of acceptance of the adhering party. Since the emergence of adhesion contracts in the last century this doubt has caused a heated debate between two schools of thought as to their nature and whether they should be regarded as real contracts.

The first school, led by Saleilles, proposed an anti-contractual thesis which denies the contractual nature of contracts of adhesion.¹⁹⁶ In their view, the common will of the parties cannot be conceived without prior exchange of views. However, in adhesion contracts the legal relationship between the parties is characterized by an exclusive dominance of a unilateral will that dictates the content of the agreement to its benefit. The offer is prepared beforehand by a monopolistic firm and presented without negotiation, therefore, the contract is not a result of mutual understanding. The function of acceptance is merely to fulfil a condition in execution of the offeror's stipulation.¹⁹⁷ Any assumption of a concurrence of wills is artificial because the adhering party is forced to accept the offer as is, without discussion.¹⁹⁸ For these reasons adhesion contracts are more akin to juridical acts and cannot be regarded as real contracts.

The second school entertains an opposite view. It believes that contracts of adhesion are real contracts in which acceptance does exist. The proponents of this theory, while recognizing the unique nature of acceptance in adhesion contracts, insist that they are not lacking any of the conditions required for the existence of negotiated contracts. In order for a contract to come into existence, all that is needed is a correspondence between

¹⁹⁵ The Explanatory Notes to Kuwaiti Civil Code, p. 94.

¹⁹⁶ Raymond Saleilles, pp. 229–230.

¹⁹⁷ Mohsen Al-Baih, *The General Theory of Obligation (vol. 1)* (Cairo, Maktabat Aljala'a no year) (in Arabic), p. 144 ; Abd-Alrazzaq Al-Sanhuri, pp. 296–297; Atef Abdulhamid Hasan, *Consumer Protection* (Cairo, Dar Annahdha Alarabiyah 1996) (in Arabic), pp. 74–78.

¹⁹⁸ Mohsen Al-Baih, *ibid.*

offer and acceptance, which is already available in adhesion contracts.¹⁹⁹ The expression of will that indicates the willingness of a person to be bound to a particular offer of another is sufficient for the formation of a contract, even in the absence of negotiation. Discussion is not necessary for the formation of contracts because in reality individuals in their day-to-day transactions accept prices and terms set by traders without negotiation. If the purpose of negotiation is to arrive at a mutually satisfactory arrangement, then it would be irrational to require the parties to negotiate the terms if the terms of the bargain suit them.²⁰⁰ In addition, it is generally conceded that exact balance cannot be achieved in every transaction.²⁰¹ Contracts inevitably display inherent differences between the rights and obligations of the parties due to the fact that individuals themselves vary in their economic position or knowledge. The adhering party's weakness is not a legal phenomenon but an economic one²⁰² and economic equality between the contracting parties has never been a requisite to contract formation. Therefore, the economic imbalance or disproportion alone does not justify the denial of the contractual nature of adhesion contracts.²⁰³

It is for this reason that the code adopted the 'contractual theorists' view and acknowledged the contractual nature of contracts of adhesion in Art. 80.²⁰⁴ However, this does not mean that the code equates them with negotiated contracts where the parties stand on equal footing. It has introduced some rules to compensate for the weakness of the adhering party. This appears prominently in the special protection afforded to the adhering party by virtue of his inability to negotiate the contract terms and his vulnerability to unfair terms. The code attempts to strengthen his contractual position in two ways: (i) by granting the court broad discretion to vary the unfair provisions or exempt the adhering party from

¹⁹⁹ Atef Abdulhamid Hasan, p. 80.

²⁰⁰ Abd-Alrazzaq Al-Sanhuri, p. 297; Mohsen Al-Baih, 145 *et seq.*

²⁰¹ Mohsen Al-Baih, p. 146.

²⁰² Abd-Alrazzaq Al-Sanhuri, p. 297.

²⁰³ *Ibid.*; Mohsen Al-Baih, p. 146.

²⁰⁴ The explanatory notes to the Kuwaiti Civil Code, p. 94.

their application; and (ii) by obliging the court to construe ambiguous terms in favour of the adhering party.²⁰⁵

2.3 Procedural problems associated with the regulation of adhesion contracts in the KCC

For any protection system against unfair contract terms to be successful, it should first and foremost take into account the inherent weakness of the consumer against the professional before and during the performance of the contract. The consumer is the weak party throughout the contract stages: before the contract formation, during contract formation and even after the conclusion of the contract. Therefore, it is important to lay down some rules for the protection of the consumer before the formation of the contract to ensure his informed consent. It is unfortunate that the KCC does not contain procedural rules that aim to protect the consumer in the pre-contract stage but confines protection to the substantive side of unfair terms.²⁰⁶ Any discussion of the protection of consumers against unfair terms should first attempt to find out how to protect the consent of the consumer so that it represents his true contractual will.

The following section will discuss the problem of informed consent in adhesion contracts and explain why the rules are inefficient in this regard. It will also suggest some solutions that the researcher believes will strengthen the position of the consumer and contribute to ensuring his informed consent. The legal nature of adhesion contracts will first be discussed and why they are regarded as derogation from the conventional concept of contract will be explained. The adhering party's consent and its associated problems will

²⁰⁵ Articles 81 and 82 respectively. These two articles will be discussed in the next two chapters.

²⁰⁶ This problem has been overlooked not only in the statutory regulation of adhesion contracts, but also in legal literature. Several legal scholars have discussed contracts of adhesion and confined the analysis to the substantive aspect of this species of contracts. See for example, Abd-Alrazzaq Al-Sanhuri, pp. 293–301; Solaiman Murkus, pp. 182–186; Ibrahim Abu Allail, pp. 176–182, Abdulmonem Faraj Assada, 'On Adhesion Contracts' (PhD thesis), Cairo, University of Fuad I 1964) (in Arabic).

then be examined, and finally solutions to overcome the problem of informed consent in adhesion contracts are proposed.

2.3.1 Lack of informed consent in adhesion contracts and its associated problems

One of the major criticisms that can be directed at the existing legal rules governing adhesion contracts in the KCC is that they do not seek to protect the adhering party's consent prior to the conclusion of the contract. Rather, the rules focus only on substantive aspects of unfairness in adhesion contracts and totally disregard the procedural aspects. More specifically, the theory of contracts of adhesion deals with one aspect of the adhering party's weakness, namely his economic weakness, and does not address an equally important species of weakness that relates to his lack of knowledge. The scope of protection in the rules has been limited to the performance stage of the contract and does not extend to deal with improprieties in the pre-contractual stage in which the effects of the lack of knowledge and inexperience are clearly manifested. Indeed, the code follows an *ex post* approach and confines the court authority to restoring substantive imbalance but not procedural imbalance. Consequently, if an adhering party wishes to avoid an adhesion contract due to procedural unfairness, such as in situations where the professional provides little information or does not observe the requirement of transparency, the only avenue available to him would be to invoke the general rules in contract theory concerning defects of consent which might not always cover these instances.²⁰⁷ To reinforce this argument, one could cite the following observation from a recent study:

"It is well established that the theory of adhesion contracts does not provide special protection for the consent of the adhering party nor does it provide

²⁰⁷ The defects of consent are enumerated by name in the KCC and they include; error, fraud, duress, and exploitation. Lack of knowledge or inexperience in itself does not qualify for avoidance of contract.

effective means to enlighten him about the implications of his obligations . . . on the contrary, it regards submission to prescribed terms to be one form of acceptance which amounts to real acceptance sufficient for the formation of the contract".²⁰⁸

The rules bind the adhering party by his acceptance even though it might not truly represent his contractual will.

The deficiency of the rules in protecting the adhering party's consent can partly be ascribed to the lack of sufficient rules to tackle procedural unfairness in adhesion contracts. This invites one to consider two issues to show the aspects of this deficiency. The first relates to the nature and quality of consent in adhesion contracts, and the second concerns the mechanism of contracting in adhesion contracts which allows the professional to abuse his economic and knowledge superiority, and draft the terms in his favour. These two issues will be addressed in the next part of this section. In the third part some proposals that could contribute to enhancing the adhering party's consent as well as controlling the contractual behaviour of the professional are offered.

2.3.2 The nature of consent in adhesion contracts in the KCC

Generally, *acceptance* can be defined as a declaration of will in which the offeree expresses his unreserved approval of an existing offer that must be communicated to the offeror in order to be effective and constitute the contract.²⁰⁹ Acceptance cannot be deemed valid unless it is expressed in a free manner, that is, free from defects of consent and expressed by a person who has capacity to contract.²¹⁰

²⁰⁸ Mohammad Abd Al-Aal, p. 88.

²⁰⁹ Art. 43.2 provides "the acceptance must coincide with the offer"; see also, Abdulhay Hejazi, p. 623; Ibrahim Abu Allail, p. 115 *et seq.*; Jamil Al-Sharqawi, *The General Theory of Obligation*, vol 1 (Cairo, Dar Annahdha Alarabiyah 1993) (in Arabic), p. 308 *et seq.*; Abd-Alrazzaq Al-Sanhuri, p. 271 *et seq.*

²¹⁰ Art. 83.

It follows from the principle of freedom of contract that the parties are free to regulate the content of their obligations by participating in the determination of the terms of the contract. This is the normal contracting paradigm which assumes that pre-contractual negotiations precede the conclusion of the contract in order to reach a bargain that satisfies both parties.²¹¹ Accordingly, under this paradigm the offeree's acceptance is a true reflection of his contractual will. However, in adhesion contracts co-determination or a common contractual will *per se* is non-existent. This absence distinguishes adhesion contracts from negotiated contracts because the adhering party's contractual will does not contribute to the formation of the common will of the parties.²¹² The process of concluding adhesion contracts departs from the normal paradigm of contract formation and contradicts the principle of private autonomy because of the total absence of negotiation, which, ultimately, results in an imposition of the proffering party's contractual will.

It could be inferred from the wording of Art. 80 KCC that acceptance in adhesion contracts is distinct from acceptance in negotiated contracts. Art. 80 asserts the validity of the adhering party's consent and indicates that although the acceptance has not been given freely, it still exists. However, the problem of acceptance in adhesion contracts is that it does not necessarily manifest the contractual will of the adhering party, especially if the contract contains unfair terms.²¹³ This is why some contract theorists have often described acceptance in adhesion contracts as "compelled acceptance" that is closer to acquiescence than a consent representing the will of the adhering party.²¹⁴ Others have qualified it as "coerced acceptance" that is connected to economic rather than psychological factors.²¹⁵

²¹¹ Anwar Sultan, *Sources of Obligations* (Alexandria, Monsha'at al-Ma'aref 1996) (in Arabic), p. 66; Ahmad Al-Refai, *The Civil Protection of the Consumer in Relation to the Content of the Contract* (Cairo, Dar Alnahdha Alarabia 1994) (in Arabic), p. 48.

²¹² Ibrahim Abu Allail, p. 179.

²¹³ Abd-Alrazzaq Al-Sanhuri, p. 293.

²¹⁴ Ibrahim Abu Allail, p. 179.

²¹⁵ Abd-Alrazzaq Al-Sanhuri, p. 93. It seems that Al-Sanhuri has been influenced by the writings of Saleilles on adhesion contracts and favoured a translation of the original French term *contrat d'adhesion* that carries negative connotation to mean submission (*Ith'aan*) as opposed to the positive/neutral meaning of the French term that means affiliation or subscription. Al-Sanhuri translation has been widely accepted by jurisprudence and courts, and his selection was later on used in all Arab civil laws; see pp. 293–294 footnotes Nos 1 and 2.

Because the contract terms are presented as a whole package on a take-it-or-leave-it basis, the adhering party (i.e., the consumer) is coerced into accepting the professional's terms, even though his acceptance does not reflect his true contractual will. However, this type of coercion is of an economic nature and does not vitiate the contract as physical or moral coercion does. According to Art. 156(1) of the Kuwaiti Civil Code, coercion – be it physical or moral – is deemed a defect of consent that impairs the freedom of contract by placing a constraint on the will of a person, consequently inducing him to consent. In order for coercion to vitiate the contract, it must pose a threat of grave and imminent danger to person or property; economic coercion in adhesion contracts does not present the same threat.

There is another matter that should be pointed out with respect to acceptance in adhesion contracts and that is that it does not strictly conform to the notion of correspondence between offer and acceptance. If the contract of adhesion contains unfair terms, then the adhering party reluctantly accepts them due to his lack of meaningful choice. Some authors have pointed out that the lack of choice explains the adhering parties' disinclination to review their agreements prior to their conclusion. It is well accepted among scholars that consumers do not read their agreements before signing them and even if they do read them, it is unlikely that they would be able to understand their content.²¹⁶ Shopping around for better terms does not avail them or guarantee a better deal either because the goods or services they are seeking are supplied by a monopoly or the terms are substantially similar in the market and have been standardized by members of the same trade.²¹⁷

²¹⁶ Rakoff asserted that it is well accepted among scholars that consumers do not read their agreements before signing them and even if they read them it is unlikely they would be able to understand their content, Todd D Rakoff, p. 1173. See also, Ahmad Al-Refai, p. 50; Thomas Wilhelmsson and Chris Willett, 'Unfair Terms and Standard Form Contracts' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010), p. 169; Law Commission, *Second Report on Exemption Clauses* (Law Com No 69), 1975, paras 11 and 146.

²¹⁷ This is either because the goods or services the adhering party is seeking are supplied by a monopoly or the members of the trade have standardized their conditions. See Kessler's discussion above.

It could be argued that there is no *exact* coincidence between the proffering party's offer and the adhering party's acceptance if the contract contains unfair terms. The acceptance is partial and does not reflect his genuine contractual will to be bound by the unfair terms. However, from a pure legal perspective, once acceptance is expressed and communicated to the offeror, it becomes binding regardless of whether the offeree accepts or refuses the unfair terms. What matters the most is the manifestation of the contractual will even though there might be a conflict between his internal will and external will.²¹⁸

2.3.3 The mechanism used to conclude adhesion contracts

The contracting model of contracts of adhesion is characterized by the exclusive dominance of one contractual will which dictates the terms of the agreement and its means of formation. The role of the second contractual will is merely to complement this will by abiding by its conditions so that the contract can be created. The second will is not allowed to influence the content of the contract nor discuss it. This absence of ability to negotiate compels it to accept all the contract terms, including terms that are detrimental to its interest.

The code lacks preventative measures that are aimed at controlling the stronger party's behaviour by forbidding him from abusing his right to contract and drafting the contract to his benefit. Apart from Art. 39 KCC, which provides that "the offer must describe at least the nature of the contract and its essential conditions", there is no other provision in the code that sets general minimum standards on contract drafting.²¹⁹ The code leaves it completely up to the proffering party to determine the substance, form and

²¹⁸ The rationale behind the code reliance on the external will of the contracting party to determine his acceptance lies in considerations relating to the stability of transactions in the market and protection of the other party's expectations and trust. For a discussion of the internal and the external will in the Kuwaiti law see Ibrahim Abu Allail, pp. 94–98; in general, see Abd-Alrazzaq Al-Sanhuri, pp. 110–114; Solaiman Murkus, pp. 143–151; Anwar Sultan, pp. 58–60.

²¹⁹ With the exception of its regulation of insurance contracts in Art. 782 in which the insurance company is required to display certain terms distinctively and in intelligible manner, such as those relating to invalidation or arbitration, the code lacks any other guidance on how terms should be drafted. Regulation of style in this article proves that control of contract drafting within the code is the exception.

style of the contract. By failing to regulate the matter, this law fails to prevent unfair contracting practices in which professionals may engage.

Two examples can be offered to illustrate the insufficiency of the rules to control procedural unfairness in adhesion contracts. The first concerns abuse of the contract language in the form of using complex or ambiguous wording for the ordinary members of the public. While the code in Art. 82 lays down the *contra proferentem* rule, which provides that any ambiguities in the contract shall be construed in favour of the adhering party, it does not set a pre-contractual duty on the author of the terms to use plain and intelligible language or at least proscribe him from obscuring the meaning of the terms. The court is allowed to construe the terms in favour of the adhering party only if they are susceptible to different meanings but not when they are complex and incomprehensible. Professionals may obscure the meaning of the terms by using complex language that is incomprehensible to the lay person who will ultimately fail to draw accurate conclusion as to their scope or legal implications.

The second illustration concerns binding the adhering party to terms that he did not have the opportunity to review by incorporating these terms into the agreement by reference. If the stronger party refers in the original document of the contract to other documents that were not readily available before contracting and the adhering party signs the original document, then his signature binds him to the incorporated terms even if he did not read them. The general rule in contract formation mandates that reception or signing the document is a strong presumption of acceptance but, in fact, this assumption does not accord with the reality in adhesion contracts in many situations.²²⁰ Nevertheless, the law regards his acceptance in the form of signature or the mere reception of the contract

²²⁰ Ibrahim Abu Allail, 179; Ahmad Al-Refai, p. 51. Cf the notion of constructive consent in US law, see John JA Burke, 'Contract as Commodity: A Nonfiction Approach' 24 Seton Hall LegisJ 285, p. 296 *et seq.*; English law attaches great importance to signatures. The general rule is that a party is bound by his signature regardless of whether he has read the contract or not so long the party took reasonable steps to bring the terms to his attention (*Parker v South Eastern Railway* [1877] 2 CPD 416), or whether he understands the terms, see *L'Estrange v Graucob* [1934] 2 KB 394; see also, JR Spencer, 'Signature, Consent, and the Rule in *L'Estrange v. Graucob*' 105 CambLJ, p. 114.

document to be sufficient to indicate his knowledge of the terms and establish their binding force.²²¹

The law in other jurisdictions sought to mitigate the effects of incorporation of terms by setting a minimum requirement for the standard terms to become obligatory for the adhering party. In Germany, for instance, section 305c(1) of the BGB invalidates unreasonable terms if the drafting party fails to provide the adhering party with an adequate notice as to their existence before the conclusion of the contract.²²² Section 305(2), too, requires that in order for a standard business condition to form part of the contract, the user must be given a reasonable opportunity to take note of the contents.

A further illustration is the indicative list of the Directive. It enumerates a number of terms that are presumed to be unfair between consumers and businesses. Among them is point (i), which refers to a term that is "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract". Similarly, the UNIDROIT Principles of International Commercial Contracts²²³ provide a significant exception to the general rules of consent in contract formation in standard agreements through the codification of the principle of "surprising terms".²²⁴ If a surprising term has been included in a standard agreement, which the adhering party could not reasonably have expected, then it would be held ineffective, unless it has been expressly accepted by the adhering party.

The rationale behind these exceptions is to prevent the drafting party from sneaking terms in without the knowledge of the adhering party²²⁵ and "to avoid a party which uses standard terms taking undue advantage of its position by surreptitiously

²²¹ Ahmad Al-Refai, p. 50.

²²² BGB section 305c(1) reads: "provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract". Translation of this provision is provided in Hugh Beale and others, p. 783.

²²³ The official text of the UNIDROIT Principles and comments can be accessed through <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>

²²⁴ Art. 2.1.20.

²²⁵ Thomas Wilhelmsson and Chris Willett, p. 171. The scope and application of this exception varies from one jurisdiction to another.

attempting to impose terms on the other party which that party would scarcely have accepted had it been aware of them".²²⁶

Any reform of the present control system of unfair terms in the context of adhesion or consumer contracts should take into account the implementation of these rules. Their establishment is certainly necessary to overcome the procedural unfairness in adhesion or consumer contracts to ensure that the proffering party took reasonable steps to bring the terms to the attention of the adhering party. They represent a starting point on which other rules can be built to address the adhering party's weakness and ensure his informed consent prior to the formation of the contract.

The section that follows attempts to suggest some solutions that the researcher believes could contribute to effective protection against procedural unfairness and the abuse of contract practice.

2.3.4 Suggestions on how to overcome the procedural problems associated with adhesion contracts

The lack of informed consent in adhesion contracts has led to the development of new legal concepts in other jurisdictions to ensure that the consumer's acceptance is a true reflection of his contractual will, as well as mitigating the negative effects of the process of acquiring his acceptance. These concepts include the pre-contractual duty to inform, the right of withdrawal and the requirement of transparency of terms. Any legal reform of the current rules in the KCC should take into consideration these concepts, and introduce subjective and objective measures to protect the adhering party's consent and his rational choice. In the opinion of the researcher these measures should include, bringing significant clauses to the attention of the consumer, expressly give the consumer the right to access the full contract documents prior to the actual formation of the contract, grant a state agency

²²⁶ Comment 1 to Art. 2.1.20.

the authority to review and verify of the contract, mandate that the terms are written in plain and intelligible language, and grant the consumer the right to withdraw from the contract after its conclusion. Calls have been made by some jurists to adopt these mechanisms to safeguard consumers' consent prior to the conclusion of the contract.²²⁷

These three concepts will be dealt with in turn.

2.3.4.1 *Duty to inform*

It is worthwhile mentioning at the outset that the KCC recognizes the duty of disclosure in a few contracts. In insurance contracts, for instance, the insured party is required to reveal all information relating to the risk he is insuring against.²²⁸ Similarly, in the contract of sale the seller must provide all information necessary for the creation of sufficient knowledge about the object of the sale.²²⁹ In addition, in the context of deceit as a defect in consent the debtor always has a positive obligation to speak and refrain from dishonest silence to conceal a fact that would have prevented the formation of the contract had the other party known about it.²³⁰

Can one conclude from these isolated pre-contractual duties that the code institutes a general obligation to inform that should be observed in all contractual relations?²³¹ The straightforward answer seems to be no. A simple extrapolation of the code provisions suggests that the position of the code is to confine the recognition of the duty to inform to instances where a party is bound to give information by virtue of a statutory provision or under the clauses of the contract. It is the researcher's opinion,

²²⁷ To name a few, see Hassan Gemei, *Consumer Protection: the Special Protection of the Consumer's Consent in Consumer Contracts*, Omar Abdulbaqi; Ahmad Al-Refai, *Alhimayah Almadaniyah Lilmostahlik*, (Dar Annahda, 1994); Nazih Al-Mahdi, *The Pre-Contractual Obligation of Disclosing Information Pertaining to the Contract and its Application on Some Types of Contracts* (Cairo, Dar Annahdha Alarabiyah 1982) (in Arabic).

²²⁸ Art. 790 KCC.

²²⁹ Art. 456 KCC.

²³⁰ Art. 152 KCC.

²³¹ Hassan Gemei, *Consumer Protection: the Special Protection of the Consumer's Consent in Consumer Contracts*, p. 15.

however, that it is possible for the Kuwaiti courts to synthesize a wider obligation to inform from these isolated instances and from the principle of good faith.²³² This can be achieved through the adoption of what the French jurist Ghestin calls the process of "amplifying induction" to deduce from these scattered manifestations a general legislative intent that aims to redress the contractual inequality and increase the responsibilities of professionals by imposing a general duty to inform. Subsequently, this can be implemented systematically in all contracts involving a lay person, not only a consumer, to foster his informed consent.²³³ Some writers suggest that the courts should not wait for regulatory intervention to protect consumers, but take the initiative by broadening the interpretation of the KCC provisions in favour of consumers.²³⁴ However, in reality it is doubtful whether this could be attained as it has been empirically proven that the Kuwaiti courts' general position is to follow a restrictive approach in interpreting the existing rules. Their disregard of the contemporary trends in contract law is indicative of their refusal to relax the meaning of the rules or derive new obligations from the existing ones.²³⁵ If Al-Nakkas's conclusion is used, it is possible to argue that at this stage the only viable way to recognize a general obligation to disclose would be through legislative intervention.

Regulatory intervention can be rationalized by reference to the need to achieve commutative justice in contracts because informational inequality prevents the realization of this end. It is important to provide consumers with all necessary information relating to the price, terms and conditions, characteristics of the product or the service so that

²³² Art. 197 provides that contracts must be performed in good faith.

²³³ For more details on Ghestin's approach, see Pierre Jr. Legrand, 'Information in formation of contracts: a civilian perspective' 19 CBLJ 318, pp. 341–342; Barry Nicholas, *The French Law of Contract*, pp. 104–105; Jacques Ghestin, p. 151.

²³⁴ Jamal Al-Nakkas, p. 55.

²³⁵ For a clear illustration of the Kuwaiti judiciary reluctance to broaden the interpretation of the KCC rules, see *ibid*, pp. 52–53. The Kuwaiti courts could infer a general obligation to inform from the principle of good faith mentioned in articles 195 and 197 relating to determination of the subject matter of the contract and contract performance respectively. The French, for example, founded the duty to inform on Art. 1134.3 relating to good faith (*bonne foi*) and Art. 1135 relating to equity (*équité*). The Kuwaiti courts could also infer a general obligation to inform from articles 195 and 197 relating to determination of the subject matter of the contract and contract performance respectively. Some commentators even argue that the duty to inform is grounded on the theory of validity and integrity of consent, see Omar Abdulbaqi, p. 200.

consumers can make informed decisions.²³⁶ Information asymmetry between consumers and professionals increased significantly over the past century by virtue of industrial and technological advancement which made it almost impossible for the lay person to grasp all the technical and legal details associated with contracts.²³⁷ The discrepancy in the level of knowledge and expertise between consumers and professionals is conducive to contractual imbalance.²³⁸ Some writers have indicated that contractual imbalance between consumers and professionals in the present age is not only of an economic nature, but also informational; therefore, the equality in knowledge is as important as equality in economic positions.²³⁹ As a result, it is necessary to redress this imbalance by imposing a general obligation to inform on professionals to alleviate information asymmetry arising from the lack of disclosure of information to achieve contractual justice based on mutual trust.²⁴⁰

However, mere provision of the duty to inform might not completely alleviate information asymmetry. Many of the modern consumer transactions are disadvantageous to consumers either because of their sophisticated subject matter or the manner in which they are concluded. On the one hand, contracts such as consumer credit contracts are characterized by their complexity of details that may not be fully understood by most consumers.²⁴¹ On the other, consumers may be psychologically pressured to make impulsive decisions through aggressive selling practices without being able to assess the possible consequences of their decisions. Consequently, there are instances where even if all information is provided for the consumer, his consent will not be informed consent. This is why it is necessary to add an extra layer of protection to reinforce the consumer

²³⁶ See Hassan Gemei, *Consumer Protection: the Special Protection of the Consumer's Consent in Consumer Contracts*, p. 14 *et seq.*

²³⁷ See Peter Cartwright, p. 20 *et seq.*

²³⁸ *Ibid.*, p. 22. It should be noted that some consumers can make rational purchasing decisions by gathering the necessary information on their own. However for many others "the learning process is more difficult and thus more costly", John Rothchild, 'Protecting the Digital Consumer: The Limits of Cyberspace Utopianism' 74 *IndLJ* 5.

²³⁹ Omar Abdulbaqi, p. 202.

²⁴⁰ *Ibid.*; see also Nazih Al-Mahdi, who was among the foremost scholars to draw attention to the significance of the duty to inform and called for its implementation, pp. 67 and 225.

²⁴¹ Omar Abdulbaqi, p. 763; Marco Loos, 'Rights of Withdrawal' in Geraint Howells and Reiner Schultze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009), pp. 237 and 249.

position and reduce the disparity in the rational decision between him and the professional regarding the conclusion of the contract. This could be achieved through the implementation of the right of withdrawal which will be the subject of discussion in the next section.

2.3.4.2 *Right of withdrawal*

The right of withdrawal²⁴² (also known as cooling-off period) is a procedural solution awarded to the consumer to allow him unilaterally to terminate the contract within a specified period without having to provide any reason or incurring any liability.²⁴³ It is a mechanism whose objective is to compensate for the disadvantageous position of the consumer by granting him additional time before being irrevocably bound by the contract,²⁴⁴ as well as protecting his consent to ensure it came into existence as a result of careful consideration.²⁴⁵

There is a direct link between the professional's duty to inform and the consumer's right of withdrawal. The professional has an obligation to provide sufficient information to the consumer regarding the terms of the agreement and the essential characteristics of the supplied goods or services. If the former fails to fulfil this obligation or supplies goods or services with disappointing quality, then his conduct should be

²⁴² Under EU law, the right of withdrawal was initially introduced to curb abuses of doorstep selling. It appeared for the first time in the Door Step Directive 85/577/EEC and since then it has been implemented in other Directives such as Distance Selling Directive 97/7/EC and Consumer Credit Directive 2008/48/EC, Evelyne Terryn, 'The Right of Withdrawal, the Acquis Principles and the Draft Common Frame of Reference' in Reiner Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (Sellier 2008), pp. 145–148.

²⁴³ Ibrahim Abu Allail, p. 274; Omar Abdulbaqi, p. 768; Christian Twigg-Flesner and Reiner Schulze, 'Protecting Rational Choice: Information and the Right of Withdrawal' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010), pp. 130 and 131.

²⁴⁴ Christian Twigg-Flesner and Reiner Schulze, p. 145.

²⁴⁵ Ibrahim Abu Allail, p. 276. Abu Allail argues that although the right of withdrawal is connected to consent, it is not related to the theory of defects of consent because the purpose of this theory is to protect the consent by ensuring its freedom from defects, whereas the role of the right of withdrawal is to ensure that the declaration of the party consent was a result of due deliberation and reflection.

indirectly sanctioned by granting the consumer the right to withdraw from the contract.²⁴⁶ However, the right of withdrawal is not only based on the information model.²⁴⁷ It exists independently of whether or not the information is provided and its main objective is to compensate for the disadvantaged weak position of the consumer.²⁴⁸ This is why it should be introduced in the context of adhesion contracts in the KCC to give the adhering party an opportunity to reconsider his contractual commitment to ensure that his consent is informed.

However, this right has an extensive influence on the contract by restricting its binding force. It strongly undermines the principle of *pacta sunt servanda*²⁴⁹ because it allows unilateral amendment of an already effective contract to the benefit of one party, consequently opening the door to a threatening to the stability of transactions. Therefore, how can one justify the award of the right of withdrawal in adhesion contracts when it seemingly contradicts the classical principles of contract law?

It should be borne in mind that the principle of *pacta sunt servanda* is not an absolute principle within the KCC. The code states in Art. 196 that "contracts are the law between the parties. Neither is allowed to cancel or amend its rules unless permissible by agreement or law". This provision establishes a general rule that contracts must be observed by both parties and, at the same time, implies that the contract parties can include whatever lawful terms they desire, including terms that place limitations on the binding force of the agreement. The code even embodies this principle in the contract of sale and recognizes the buyer's right to withdraw by mutual agreement if explicitly mentioned in the contract, such as in the sale upon trial or testing or sale by way of down payment.²⁵⁰ Additionally, exceptions to the binding force of the contract may be prescribed by legislation. Law No. 64/1999 concerning intellectual property rights grants the author of

²⁴⁶ Clarisse Girot, p. 71.

²⁴⁷ Christian Twigg-Flesner and Reiner Schulze, p. 145.

²⁴⁸ Ibid., p. 146.

²⁴⁹ Marco Loos, p. 241; Omar Abdulbaqi, p. 764.

²⁵⁰ Art. 458 and Art. 74 KCC respectively.

literary works, subject to court approval, the right to withdraw his work from circulation.²⁵¹ Therefore, in principle, the right of withdrawal is not alien to the Kuwaiti contract law and its implementation can be easily justified in the context of adhesion contracts.

The right of withdrawal can also be justified, in my opinion, on the basis of the principle of freedom of contract. This principle implies that contractual obligations rely on the consent of the parties and that the agreement should be the result of mutual understanding and meets the expectations of each party. Thus, if the professional abuses his right to contract to obtain an excessive advantage over the consumer which results in gross imbalance between the two parties, then such behaviour should be sanctioned by reversing the positions of the parties and granting the weak party the right to cancel the agreement unilaterally to redress the contractual imbalance and maximize the fairness of the contract.

However, preconditions and restrictions on the exercise of this right should be introduced alongside its recognition. A balance should be struck between the interests of the consumer and the professional to prevent its abuse by consumers, especially when the professional does not breach his duties and takes all necessary steps to render the consumer's consent informed.²⁵²

2.3.4.3 The principle of transparency

A further deficiency in the theory of adhesion contracts under the KCC is that it does not aim to control the form of the contract. The code lacks explicit rules about contract drafting and leaves it up to the professional to determine the content and form of the contract document. Not only can the professional obscure the meaning of the terms in his favour by

²⁵¹ Art. 35.

²⁵² Abuse can be prevented by placing limitations on this right, such as restrict the exercise of the right to withdraw to a specific timeframe and allow exceptions for particular goods.

using sophisticated language, but he can also shrink the print size of the terms to discourage consumers from reading the document. The protection measures provided in the code in this regard are futile because they do not address the formal aspect of the contract document. What is needed is to strengthen the position of the consumer prior to the conclusion of the contract by obliging the professional to make the terms more accessible to the adhering party. Therefore, another preventative measure should be introduced to reinforce the duty of information and the right of withdrawal to protect the consent of the adhering party prior to the conclusion of the contract.

This can be attained through the adoption of the principle of transparency.²⁵³ It simply means that contracts should be drafted and communicated in plain and intelligible language. The objective of this requirement is to allow the ordinary member of the public to determine the legal and economic significance of the term, and enable him to assess their implications without legal advice. On the other hand, it seeks to deter abuse of language and style of the contract by the professional, and oblige him to give the adhering party the opportunity to examine the terms. There is a pressing need to establish such a duty in the Kuwaiti contract law and deem its violation as an illegitimate business practice.

The requirement of transparency prescribes that the professional observes two duties that complement each other. First, the terms must be "plainly" drafted in a comprehensible format to avoid any ambiguity or complexity as to their meaning. That is to say that the professional should avoid the use of technical legal terminology and make the significance of the terms precise, complete and straightforward. Second, the layout of the contract in terms of presentation and structure should make the text "intelligible" so that the consumer can easily follow it. The size of the print in the document, and the quality and colour of the paper should contribute towards facilitating the legibility of the terms. If the agreement contains clauses that diminish the rights or increase the obligations

²⁵³ The principle of transparency is an important measure to control unfair terms. It is embodied in Art. 5 of the Directive, well as Regulation 7(1) of the UTCCR.

of the consumer, then these clauses must be brought to his attention and printed in a distinct colour to highlight their significance.

The imposition of the requirement of transparency would not be fruitful unless its breach is tied to a sanction. Although the code adopts the *contra proferentem* rule in Art. 82 and mandates that doubt as to the meaning of the terms should be construed in favour of the adhering party, it remains a weak weapon and does not suffice to discourage the abuse of language and style in contract formation. Many terms may have one possible meaning yet are drafted in neither plain nor intelligible language for ordinary individuals. Therefore, the breach of this requirement should be explicitly prohibited and sanctioned.

A look at comparative law provides a learning experience that could be beneficial in presenting recommendations for reform of the Kuwaiti law. In Germany the courts have developed a tendency to declare contractual terms ineffective on the mere grounds that they lack transparency.²⁵⁴ In one of the cases the Bundesgerichtshof (hereinafter BGH) (the Federal Supreme Court) held that terms can be unfair because of their lack of transparency, regardless of whether or not they were unfair in substance.²⁵⁵ In the UK, under the Unfair Contract Terms Act, 1977 (hereinafter UCTA), one of the factors the court can take into account when assessing whether a term is reasonable is the intelligibility of the text. Thus, terms could fail to satisfy the test of reasonableness and be regarded as unfair if unintelligible.²⁵⁶ This view has been reinforced by case law.²⁵⁷ In addition to UCTA and case law, Regulation 6(2) of the UTCCR provides that the core

²⁵⁴ Christian Armbrüster, 'Standard Contract Terms and Information Rules' in Hugh Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008), p. 167.

²⁵⁵ BGH 17 January 1989, NJW 1989, 582. See also Paolisa Nebbia, pp. 138–139.

²⁵⁶ Schedule 2 of the UCTA supplies the court with a number of guidelines that the court can take into consideration. Guideline (c) provides: "whether the customer knew or ought reasonably to have known of the existence 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".

²⁵⁷ See, for instance, *Stag Line Ltd v Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep 211; *George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 314. In *Stag Staughton J* commented: "I would have been tempted to hold that all the conditions are unfair and unreasonable for two reasons: first, they are in such small print that one can barely read them; secondly, the draughtsmanship is so convoluted and prolix that one almost needs an LLB to understand them. However, neither of those arguments was advanced before me, so I say no more about them".

terms (i.e., the definition of the subject matter of the contract, or to the adequacy of the price or remuneration, as against the goods or services supplied) would lose their exemption and be subjected to judicial review for fairness if they are not in plain and intelligible language.²⁵⁸ In recent years the Law Commission recommended in its report that it should be possible for a contract term to be found to be unfair principally or solely because it is not transparent.²⁵⁹ The commission produced a Draft Unfair Contract Terms Bill, which was published in its report, and proposed that in determining whether a term is "fair and reasonable" it should be assessed according to the extent to which the term is transparent.²⁶⁰

Kuwaiti law should take these legislative solutions into consideration and expressly prohibit the use of complex language in consumer contracts by introducing a general duty of transparency and attach specific sanction to its breach to deter professionals from abusing their right to contract. The most appropriate sanction would be declaring non-transparent terms ineffective.²⁶¹

In conclusion, the existing regime for the control of unfair terms as outlined in the KCC will remain inefficient and deficient as long as it seeks to remedy the adhering party's economic weakness and continue to disregard his knowledge weakness. The absence of *ex ante* protection measures contributed to the failure of the present control regime as it merely seeks to regulate substantive unfairness. Any future reform of the

²⁵⁸ The House of Lords in *Director General of Fair Trading v First National Bank* [2002] 1 All ER 97 in the context of its discussion of the regulations and the principle of good faith highlighted the importance of the proper use of language and style in contract drafting. Lord Bingham said at para 17: "Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer".

²⁵⁹ Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292 Cm 6464, Scot Law Com No 199), 2005, para 3:102.

²⁶⁰ *Ibid.* at Annex A, Clause 14(1).

²⁶¹ Administrative bodies can direct professionals to use or avoid certain terminology to make agreements more accessible to ordinary consumers. The Office of Fair Trading in the UK, for instance, issued guidance on unfair terms in consumer contracts and warned that reference to technical vocabulary, such as indemnity and statutory rights, should always be avoided because they would have onerous implications of which consumers are likely to be unaware. See section IV of the Unfair Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, OFT 311, OFT, September 2008.

control system of unfair terms in Kuwait should combine both procedural and substantive elements in order to restore contract equilibrium.

2.4 Adhesion contracts as interpreted by the courts: A conceptual problem

2.4.1 The dichotomy between the rule of law and its application

The regulatory framework for protection against unfair contract terms in the KCC is defined in the context of adhesion contracts in articles 80–82.²⁶² The adopted approach for the control system is rather simple and straightforward. The code requires the satisfaction of two conditions in a contract to be regarded as an adhesion contract and, hence, qualify for protection against unfair terms: (i) the contract must be pre-drafted by the offeror, and (ii) the adhering party is prevented from negotiating the terms. In order for the adhering party to be protected against unfair terms, he must expressly request judicial intervention, otherwise the court is proscribed from reviewing the unfair terms of its own accord.²⁶³

Although these articles can, to a limited extent, provide consumers with protection against unfair terms, the restrictive interpretation of the concept of adhesion contracts by the courts and jurists succeeded in narrowing their scope considerably to encompass a few contracts only. They prescribe additional features in order to consider a contract an adhesion contract, namely the offer must relate to goods or services of an essential need, the offeror is a monopoly whether in fact or law, the monopoly makes its offer on general terms. However, when the concept of adhesion contract as articulated in the above articles

²⁶² Art. 80 KCC provides: "It does not preclude the existence of the contract if acceptance comes in the form of adherence of one party to the will of another by the delivery to a pre-drafted and non-negotiable model agreement prepared by the offeror". Art. 81 KCC provides: "If the contract is concluded by way of adhesion and includes unfair terms, the court may, at the request of the adhering party and in accordance with the rules of equity, amend the terms to alleviate unfairness or relieve the adhering party from their application even if he is aware of their existence. Any agreement to the contrary of this provision shall be deemed null. Art. 82 KCC provides: "In adhesion contracts, doubt shall always be construed in favour of the adhering party".

²⁶³ It is noteworthy that even if the adhering party makes such a request, the court jurisdiction remains discretionary and, therefore, depending on its understanding, the court may refuse to amend the contract in favour of the adhering party; see Art. 81 KCC.

is contrasted with the judicial and jurisprudential theory of adhesion contracts, there is a noticeable division between the rule of law and its application.

The researcher believes that the judicial and the jurisprudential approach towards the concept of adhesion contract is not only incorrect and contrary to the spirit of the code, but also outdated, impractical and deprives weak parties from the protection they deserve. If the present regime for the protection against unfair terms is to be corrected, then the first step should be to disassociate the protection against unfair terms from the prevailing theory of adhesion contracts and attempt to reconceptualize the theory to address the weakness of the adhering party regardless of the type of contract.

In the following pages an attempt is made to sketch out the judicial and jurisprudential theory of adhesion contracts (hereinafter ‘the traditional theory’) and to discuss why the researcher believes it is erroneous. This is followed by an outline of the new trend in Arab jurisprudence that supports a more relaxed theory of adhesion contracts that accommodates consumer contracts and an explanation why the researcher is in favour of its adoption.

2.4.2 The traditional theory of adhesion contract

The failure of the protection regime against unfair terms in the Kuwaiti law can largely be ascribed to the meaning the courts and jurists gave to adhesion contracts, which narrowed the application of the theory. It is a well-established fact in courts’ decisions and in the writings of legal scholars²⁶⁴ that in order for a contract to be regarded as an adhesion contract, three characteristics must exist:

²⁶⁴ In scholastic writings, see Abd-Alrazzaq Al-Sanhuri, pp. 294–295; Solaiman Murkus, p. 183; Al-Sayed Omran, *The Protection of the Consumer during the Formation of the Contract* (Alexandria, Monshat Al-Maaref 1986) (in Arabic), p. 27; Abdulmonem Faraj Assada, p. 77; Said Abdussalam, *Contractual Balance in Adhesion Contracts* (Cairo, Dar Alnahdha Alarabia 1998) (in Arabic), p. 37, Abdulrasol Abudlredha and Jamal Al-Nakkas, p. 78; Ibrahim Abu Allail, p. 179. Examples of judicial cases are Com App No. 770/94, 19/12/1994; Com App No. 142/95, 27/11/1995; Civ App No. 10/85, 27/3/1985; Com Adm App No. 1024/89,

- i. The object of the contract must pertain to a good or service of an essential need
- ii. The provider of the good or service is a monopoly
- iii. The monopoly makes its offer on general terms.

What follows is a discussion of each characteristic.

2.4.2.1 Essentiality of the good or service

The assumption under the principle of freedom of contract is that the contract is a true reflection of the parties' common contractual will because negotiations over the contractual terms allow the parties to structure their deal in a manner that satisfies each party. In contrast, the contracting paradigm in adhesion contracts deviates from this principle due to the absence of the negotiation phase in which the stronger party imposes his terms on the adhering party. Therefore, the adhesion contract is seen as an exception to this principle because of the absence of contractual freedom and lack of real choice. This is why some theorists suggest that consent in adhesion contracts is a form of compelled or economic coercion, as pointed out earlier.²⁶⁵ However, it would seem that traditional theorists believe that lack of choice can only occur when the good or service the adhering party is seeking is essential to his living; in other words, they correlate the notion of coerced consent with the notion of essentiality and view the exceptional nature of adhesion contracts only in the context of coerced consent as a result of the adhering party's need to acquire an essential good or service.

What is an essential good or service? According to traditional theorists, in order for a good or service to be essential it has to be indispensable and necessary for the livelihood of individuals. Indispensability of the good or service simply means that

14/11/1989; Com App No. 428/89, 5/12/1989; Com. Cass. No. 217/95, 24/11/1996; and Com. Cass. No. 101/89, 2/11/1998.

²⁶⁵ See the discussion on the nature of consent.

individuals cannot live without the good or the service or could, but with great difficulty.²⁶⁶ In some cases the courts refer to the notion of "harm" as a criterion to distinguish between essential and non-essential goods; the good can only be regarded as essential if its deprivation causes harm to the public.²⁶⁷ The classical examples of a good or service provided in the literature are water, electricity, telephones, transport, insurance, gas, mail and labour.²⁶⁸ Because the lives of individuals depend on these goods or services, they have to get them even if the contract terms are unfair or burdensome.²⁶⁹

The traditional theorists view essentiality from an objective perspective in the sense that the good or the service should not only be indispensable for few individuals or for a particular group of individuals, but for the public as a whole.²⁷⁰ Therefore, if a certain good or service is essential for a group of individuals but not for the public, then it falls out of the scope of their theory of adhesion contracts and, hence, do not qualify for protection against the unfair terms. However, the traditionalists' perspective on the state of essentiality is not static, and may change from time to time and from one place to another according to the needs of the society. Therefore, the circumstances of the adhering party could also be determining factors in the meaning of essentiality.²⁷¹

Determination of whether a good or a service is essential is a factual matter that falls within the exclusive jurisdiction of the trial court and cannot be revised by the Kuwaiti Cassation Court.²⁷² This means that if the trial court declines to deem a certain good or service to be of an essential nature, then the Cassation Court does not have the authority to challenge the lower court's decision.

²⁶⁶ See the cases and writings cited in the beginning of this section (section 3.4.2).

²⁶⁷ Com App No. 428/89, 5/12/1989

²⁶⁸ Abd-Alrazzaq Al-Sanhuri, p. 295; Com App No. 142/95, 27/11/1995, as an example.

²⁶⁹ Al-Sanhuri, *ibid.*

²⁷⁰ Ibrahim Abu Allail, nt. 1 p. 179.

²⁷¹ Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 104.

²⁷² The Cassation Court in Kuwait is a pure legal court and does not review the facts of the case. It can only render the lower courts' decisions for procedural and legal errors in case of breach, misapplication or misinterpretation of the law (Art. 152 of Law No. 38/1980 concerning Civil and Commercial Procedure).

In the researcher's opinion, the requirement of essentiality can no longer be maintained because it is flawed and raises the following problems:

- i. This classical understanding of adhesion contracts is influenced by the old theory of adhesion contract that dominated Western legal thought (especially in France and the US) which ties adhesion and standardisation of business terms to monopoly and abuse of economic power.²⁷³ The legal writings in the first half of the twentieth century show that the predominant ideology was that the strong party manages to dictate its own terms not only by virtue of its superior economic position, but also because it provides essential commodities for the individual's needs.²⁷⁴ While this argument was valid in the past when large enterprises did control the supply of necessary goods and services, it can no longer be maintained with the opening and liberalisation of markets where several competitive businesses provide essential goods and services.
- ii. The concept of adhesion contract was principally created to address the economic weakness and lack of bargaining power of the consumer. Therefore, its main purpose is to confront traders' abuse of their right to contract and rebalance the undertakings of the parties. Yet, the requirement of essentiality can deprive the

²⁷³ See the discussion above, p. 7 *et seq.* It seems the Arab judiciary and jurisprudence remain faithful to the opinion of the early scholars, in particular Al-Sanhuri and Assadda, who defined the conceptual framework for adhesion contract and examined its characteristics as it were in the first half of the twentieth century. Al-Sanhuri (often described as the father of the Arab civil law) was the first contract law jurist to deal with adhesion contracts in his compendium on civil law and Al-Saddah, who composed the first thesis on adhesion contracts in 1946. The works of these two esteemed scholars appear to have been influenced by the dominant legal thought in France with respect to adhesion contract in the middle of the twentieth century. They cited French authors such as Saleilles, Missol and Saint-Remy, who all provided analysis of the adhesion contracting paradigm as it was prior to the 1950s. The concept of adhesion contracts in French jurisprudence, however, has evolved significantly since the development of consumer protection movement in 1970s to adopt a more relaxed concept of adhesion contracts that emphasises the ability of the superior party to impose his conditions rather than the satisfaction of the three above mentioned features. The French courts frequently intervened to control unfair terms in adhesion consumer contracts, even if the contract does not satisfy all the criteria of adhesion contract and the protection no longer associates adhesion contracts with monopoly. See, for example, Jacques Ghestin, *Traité de Droit Civil—La Formation du Contrat* (3rd edn, Librairie générale de droit et de jurisprudence 1993) at para 94 *et seq.* See also Art. 35 of the law 78–23 of 10 January 1978 (now Art. L-132-1 *et seq.* of the Consumer Code of 1993) which provided protection against unfair terms regardless of whether or not the good or service is essential. See also, Hugh Beale and others, pp. 789–792.

²⁷⁴ Abdulmonem Faraj Assada, p. 64.

consumer of his right to protection in cases where his economic weakness is clearly manifested on the sole ground that the object of the contract is not essential. Thus, tying the notion of adhesion to the essentiality of the object of the contract is not accurate, as consumers may adhere to the unfair terms even if the object of the contract is not for the satisfaction of an urgent need.

- iii. Additionally, besides the consumer's economic weakness, another aspect of weakness has emerged in modern times by virtue of scientific and technological advancements and that relates to information asymmetry and lack of knowledge. The rigidity of the classical theory of adhesion contracts fails to deal with this aspect and makes the law futile in protecting consumers in most contracts.
- iv. The premise of the classical theorists engenders a paradox. Although the object of some contracts falls outside the conceptual framework of essentiality, they are nonetheless regarded as adhesion contracts. Insurance contract, for instance, are widely accepted as a classical example of adhesion contracts even though insurance is not essential for most individuals.²⁷⁵

2.4.2.2 The offeror has a monopoly whether in law or in fact

The second feature of adhesion contracts, according to the traditional theory, is that the offeror must be in a monopolistic position, whether legal or factual, or is at least in a dominant position that leads to limited competition.

In the traditional theorists view, the offeror's monopolistic position enables it to stipulate and impose the terms on the adhering party for lack of competition which would force it to review its terms. Therefore, the adhering party is in no position to refuse the

²⁷⁵ Abd-Alrazzaq Al-Sanhuri. 295; Abdulmonem Faraj Assada, p. 212. Similarly, the Kuwaiti courts in a recent decision, Com App No. 770/94, 19/12/1994, considered a credit card agreement (Diners Club) to be an example of adhesion contracts where it is only an alternative payment system and does not fall within the purview of the classical categorisation of the traditional theorists of essential services.

terms as presented because the offer relates to the satisfaction of an essential need that cannot be substituted by any other professional.

The traditional theorists' requirement of monopoly as an essential aspect in adhesion contracts raises a number of comments.

First, the requirement of monopoly in adhesion contracts is superfluous and unnecessary. The theory of adhesion contracts was primarily created to counter the economic weakness of the adhering party which allows the offeror to dictate the terms and refuse to discuss them by virtue of its monopolistic position. Thus, the rationale for protection in adhesion contracts is not the idea of monopoly itself, but rather the effect that monopoly engenders which, contrary to the principle of freedom of contract, allows one party to dominate the whole transaction. Therefore, the protection against unfair terms should not be limited to contracts entered into with monopolies and should be expanded to include any situation where the contractual freedom of the adhering party is absent. In addition, binding the use of adhesion contract to monopoly is misleading, for it has become a common practice in the market, even by small businesses, to use standard contracts to facilitate transactions. In contrast, adhesion contracts may be used even if the stipulator is not economically superior such as in the case where a bank seeks to print some material and agrees to abide by the terms the printing company offers.

Secondly, the effect of monopoly in the view of the traditional theorists is, it seems, not only the elimination of the adhering party's bargaining power due to his inferior economic position, but also his deprivation of freedom of choice because monopoly restricts new competitors from entering the market to provide substitutes or offer better contract terms.²⁷⁶ Therefore, their view can be analysed in terms of two elements: (i) economic and (ii) legal, and their integration is a requisite for a contract to be regarded as an adhesion contract. The economic element is the superiority of the supplier and the legal

²⁷⁶ Abdulmonem Faraj Assada notes that there is almost a consensus on the requirement of monopoly, and further adds that the monopoly must be apparent and last for a long period, p. 58 *et seq.*; Atef Abdulhamid Hasan, p. 66.

element is the absence of negotiation in the form of unilateral setting of the terms. The economic superiority of the stipulator should not be measured by reference to the adhering party, but rather by the supplier's market size and share, which has to be so large, to the extent that it dominates the market and stifles competition.

Thirdly, by requiring the supplier to be a monopoly, the traditional theorists insist on the historical origin of adhesion contracts which has already been abandoned long ago. Studies conducted on adhesion contracts in the Western world during the first half of the twentieth century linked their emergence as a new contracting mechanism to large-scale monopolistic enterprises that found it economical to use standard form contracts to supply mass demands for goods and services.²⁷⁷ Thus, when the early commentators sought to identify the main features that characterised the contract of adhesion, they noticed that the stipulator enjoyed a superior bargaining position in the form of a monopoly.²⁷⁸ The Arab jurists who investigated the theory echoed the features as presented, primarily, by French jurisprudence at that time. However, subsequent studies on adhesion contracts have not attempted to develop the theory according to the changes that have taken place in the market and in the society.

Fourthly, Arab jurists' insistence on the association between the notion of monopoly (*ihthikar*) and essential commodity finds its roots in Islamic jurisprudence where Muslim jurists require the possession of an essential commodity by a trader in order to recognize the existence of monopoly.²⁷⁹ However, monopoly in Islamic law (*fiqh*) has a different connotation: it means hoarding of goods and arises when a trader collects and stores an essential commodity in anticipation of an increase in price. Islam forbids such practice and bans its formation because it inflicts harm on society and deprives the public

²⁷⁷ See the discussion on the characteristics of adhesion contracts in section 2.2 of this chapter.

²⁷⁸ Marcel Planiol and Georges Ripert, pp. 136–137; Arthur Lenhoff, p. 481.

²⁷⁹ Mohammad Abdulthaher Hussain, p. 50.

from availing themselves of basic necessities.²⁸⁰ Modern Arab legal scholars seem to have been influenced by this understanding and sought to establish an Islamic basis for the notion of monopoly despite the difference in meaning of the term in contemporary economics and in Islamic law.

Fifthly, the problem with terms such as monopoly and dominant position is that courts and jurists have resonated them for over a half a century without explaining their connotations in full. From the cases cited above and the writings of the jurists on adhesion contract, one can generally deduce that the traditional theorists divide monopoly into two types: (i) legal and (ii) factual. The connotation of the first type should not pose any difficulty in Kuwaiti law because it is already mentioned in the Kuwaiti Constitution, in Art. 153, which provides: "No monopoly shall be granted except by a law and for a limited period". Furthermore, Art. 152 of the Kuwaiti Constitution explains that legal monopoly may exist on natural resources or a public service.²⁸¹ Thus, legal monopoly is an exclusive licence granted by the government to a person to exploit a natural resource or to provide a utility service. In contrast, factual monopoly arises when a firm controls a market that does not feature legal restraint to entry.

However, *monopoly* is an economics term and can only be thoroughly understood with reference to microeconomics and, if it is to be defined, it should be with reference to economics. However, when the term as defined in economics is compared to that adopted by the Kuwaiti courts in the context of adhesion contracts, one can conclude that the judicial understanding of monopoly is rather unclear and perplexing. To illustrate this, monopoly needs to be defined from a microeconomics perspective and the courts' treatment of the concept needs to be assessed.

²⁸⁰ What constitutes a basic necessity is subject to dispute. There are three views regarding the issue. One view is that monopoly cannot arise except with respect to food. The second view adds clothes next to food and the third view holds that monopoly exists with respect to any commodity the people need, the hoarding of which would inflict harm. See Hosni Abdeldayem, p. 127 *et seq.*

²⁸¹ See also, Ahamad Al-Melhem, *Monopoly and Monopolistic Actions* (Kuwait, Kuwait University Press 1997) (in Arabic), p. 7.

In microeconomics, *monopoly* means absence of competition and total absence of competition in pure economic terminology occurs when there is a "perfect (or pure) monopoly".²⁸² Perfect monopoly exists when a person is the sole supplier of a commodity for which there are no close substitutes.²⁸³ It is a market structure where one trader accounts for all the industry sales of a certain good or service. Therefore, it is characterized by the existence of a single seller; absence of close substitutes of the commodity it offers; the seller is a price maker (i.e., possesses considerable control over the price); and it has no immediate competitors because it is protected by barriers that prevent potential competitors from entering the market.²⁸⁴

However, when one looks at the courts' decisions with respect to adhesion contracts, the conclusion could be reached that the courts almost in all cases refrained from defining monopoly, and in some cases it gave the meaning of monopoly another construction, creating confusion as to what monopoly really means. Here a prominent case can be cited to support this argument.

In 1989 the High Court of Appeal in Kuwait dismissed an appeal to alleviate unfair terms relating to the unilateral change of prices in a mobile subscription contract on the grounds that the service provider, the Mobile Telecommunications Company (MTC), was not a monopoly on the grounds that its establishment decree did not grant it the licence to monopolize the market, despite the fact that it was the exclusive provider of a mobile telephony service.²⁸⁵ The conclusion of the court which denied the monopolistic nature of the company's activity triggered dispute and criticism among academics.

Two opinions suggest that the court erred in its decision and that the company was indeed a monopoly but these two views diverge on whether it was a legal monopoly or a

²⁸² Campbell McConnell, Stanley Brue and Sean Flynn, *Microeconomics: Principles, Problems, and Policies* (19th edn, McGraw-Hill/Irwin 2012), p. 195.

²⁸³ Ibid.

²⁸⁴ Campbell McConnell, Stanley Brue and Sean Flynn.

²⁸⁵ Com App No. 428/89, 5/12/1989.

factual monopoly. The first view²⁸⁶ regards MTC as a factual monopoly because even though it was the exclusive telecommunications operator in the country at that time, its establishment decree stated expressly in Art. 3 that the operation licence did not grant the company a monopoly or a concession.²⁸⁷ In contrast, the second view²⁸⁸ holds that the company was indeed a legal monopoly, regardless of what Art. 3 of the company's establishment decree expressly provided because the government had granted the company, through legislative apparatus, the exclusive right to provide mobile telephony service since 1983, which gave it 100% control over the market.

It seems to the researcher that the second view is more consistent with the logical interpretation of the company's establishment decree and the purposes of its promulgation, that is, the set-up of a telecommunications operator as a sole provider of a mobile telephony service. It transcends the literal meaning of the provisions of the decree, especially Art. 3, to search for their actual meaning. Moreover, a closer look at Art. 153 of the constitution suggests that in order for a legal monopoly to exist, satisfaction of one condition is required; that is, monopoly is granted by law, which is the case. The decree gave effect to a legal monopoly that controlled an entire sector. The statement in Art. 3 that the law does not grant the company a monopoly does not change the fact that it was indeed a legal monopoly. Furthermore, a legal restraint on market entry existed, and it was not possible for other businesses to enter and compete in the telecommunications market without a licence from the government.²⁸⁹

²⁸⁶ Ahamad Al-Melhem, pp. 94–95.

²⁸⁷ Art. 3 of the Emiri Decree of 22/6/1983. After Kuwait had joined the World Trade Organization (hereinafter 'WTO'), the telecommunications sector was liberalized and opened for competition. The sector in the country currently comprises three mobile operators. Nonetheless, the researcher believes that if the nature of mobile telephony contracts were to be examined again by the courts, the courts would continue to refuse to regard them as adhesion contracts on the grounds of the absence of monopoly.

²⁸⁸ Tamah Al-Shemmari, 'The Extent of Price Determination for Goods and Services under Sharia and Kuwaiti Law (in Arabic)' Law Gaz 141, pp. 153–154.

²⁸⁹ Although not clearly articulated, the courts seem to consider duopoly and oligopoly to fall under the purview of monopoly, that is, the market could be dominated by two persons or a small number of persons where each holds a large number of the market share. This is the case in the insurance sector where several companies compete in the market but the courts, nevertheless, consider their contracts to be adhesion contract, see Ahamad Al-Melhem (1997), p. 95.

Another problem arises when one seeks to identify the courts' concept of *dominant position leading to limited competition*. While the measurement of monopoly power in case of perfect monopoly is uncomplicated, neither the courts' decisions nor the majority of scholarly writing on adhesion contracts explain when a business is in a dominant position. This can be ascribed to the fact that the concepts of "monopoly" and "dominant position" had not been statutorily regulated in Kuwait until 1996 with the introduction of Law No. 13/1996 which added new articles to the Commercial Code.²⁹⁰ Art. 60 bis B of the law established a criterion for the measurement of monopoly based on its "ability to control the prices of goods and services". The Explanatory Note to the law provides examples of the monopolistic position: (i) when the trader has no competitors, (ii) when the trader faces immaterial or limited competition or (iii) when the trader possesses a market share far greater than its competitors, unless it proves that it cannot control the prices or avoid competition.²⁹¹

However, this criterion can be criticized on the basis that it does not shed enough light on what "ability to control the prices" actually means.²⁹² The law raises further questions such as: What is the extent of the "ability to control the prices" and how it can be measured? What is the acceptable level of price change with which one can say a trader holds a monopolistic position? In competitive markets what is the size of the market share that the trader must possess in comparison to its competitors in order to declare that it holds a monopolistic position? The law, unfortunately, does not provide a conclusive answer to these questions and leaves the matter to the exclusive discretion of the courts.

The concept of *monopoly* remained vague because neither the law nor the courts explained when a trader comes into a monopolistic position and how its influence in the

²⁹⁰ The law was primarily introduced to foster competition and curb anti-competitive practices that have detrimental consequences for the operation of a free market. However, the importance of this law in the present discussion lies in the fact that it was the first legislation to measure monopoly power. For further details, see Ahmad Al-Melhem, 'Privatisation and Protection of Investors in Kuwait : Reality and Ambition' 13 ALQ 178, pp. 178–199.

²⁹¹ See also Ahamad Al-Melhem (1997), pp. 88–89.

²⁹² *Ibid.*, p. 96.

market can be measured. The shortcomings of Law No. 13/1996 were later realized and was, therefore, repealed with law No. 10/2007 Concerning the Protection of Competition.²⁹³ The new law substituted the concept of *monopoly* with *dominance* and regarded a trader as being in a dominant position if it controlled more than 35% of the size of the market.²⁹⁴

The discussion above shows that the courts' decisions and scholarly writings on adhesion contracts lack a clear definition of the concept of monopoly, which has been largely left unregulated until the enactment of Law No. 13/1996. However, even with the enactment of this law, which attempted to set a criterion for the measurement of monopolistic position, except in the case of pure monopoly, the concept of monopoly has remained surrounded with ambiguity and uncertainty, with the absence of clear-cut rules that determine how to calculate a trader's ability to control the prices in the market or his market share in order to qualify for the description of monopoly.

2.4.2.3 *The general nature of the offer*

The third feature of the traditional concept of adhesion contracts is the generality of the terms of the offer. This feature, in fact, echoes Art. 80 KCC which acknowledges the permissibility of using pre-drafted agreements as a modern contracting mechanism. Because it is practically impossible for businesses that supply mass goods or services to negotiate their contract terms with each and every consumer, they seek to conclude the contract with an alternative mechanism by reducing the process of contracting through the elimination of the three stages concomitant with private contracting, namely (i)

²⁹³ However, it is worthwhile mentioning that the law was primarily promulgated to satisfy Kuwait's commitments to the WTO, which requires the existence of anti-monopoly laws and sufficient regulations that guarantee effective protection of competition; see the Explanatory Note to Law No. 10/2007.

²⁹⁴ Art. 1(d) defines *dominance* to mean: "a situation which enables a person or a group of persons work collectively directly to indirectly exercise control over a commodity market by possessing a percentage exceeding 35% of the size of that market". This article can also be criticized because it does not elaborate on how a trader market share can be measured.

individuality, (ii) negotiation and (iii) time. This can be achieved with the generalization of the offer so that these three stages can all be condensed into one stage by making the offer abstract, detailed and specific, and continuous.²⁹⁵

First, the offer is prepared in an abstract manner and is addressed to an undetermined number of persons rather than to a specific person. The individuality of parties does not exist in mass contracts because the personality of the adhering party is insignificant to the offeror as opposed to private contracting.²⁹⁶ Abstraction of the offer requires the standardization of the terms for all those involved in this type of transaction as the commodity the offeror provides is intended to satisfy a public demand, such as gas, electricity and water.

In addition, the generality of the offer assumes domination of contract formation by the offeror through the standardization of the terms of the offer by virtue of its economic and knowledge superiority. The effect of standardization is the elimination of the negotiation phase in which the offeror can prevent discussion, and impose the terms that reflect its interest and allow it to shift the allocation of risk on to the shoulders of the consumer.²⁹⁷ Not only this, but with the utilization of standard contracts the offeror can facilitate the rationalization of managing its business by saving transaction costs, time and effort that has to be spent on drafting and discussions of individuals contracts.

Thirdly, the offer in adhesion contracts is characterized by its continuity in the sense that it is not bound to a limited or a specific period, but rather it is valid for an unlimited number of transactions as this is consistent with the nature of mass contracts.

The requirement of the generality of the offer is sufficient to regard a contract as an adhesion contract. It is consistent with the reading and spirit of the text of Art. 80, and

²⁹⁵ Ibrahim Abu Allail, p. 178; Abdulmonem Faraj Assada, p. 66.

²⁹⁶ Kessler commented: "The individuality of the parties which so frequently gave color to the old type contract has disappeared. The stereotyped contract of today reflects the impersonality of the market", p. 631.

²⁹⁷ Ibrahim Abu Allail, p. 178.; Abdulmonem Faraj Assada, p. 68. Al-Sadda further adds that the offer is usually complicated to the extent that it is incomprehensible to the normal person and is, therefore, rarely read.

should be the only requirement for the existence of adhesion contracts and protection against unfair terms.

2.4.3 Towards a modern concept of adhesion contracts

The main problem with the traditional theory of adhesion contracts is that it leads to the inevitable promotion of the principle of sanctity of contract and the stability of transactions at the expense of contractual justice. Its narrow conception limits the application of the theory and leaves out of its scope several types of contracts merely because they do not satisfy its rigid requirements. Today's markets became more competitive as a result of the creation of the World Trade Organization, and governments aim to liberalize their economies and abolish monopolies. In addition, the developments in science and technology have made goods and services more sophisticated, and gave rise to consumers' knowledge weakness in addition to their economic weakness.

This is why many countries have deserted the old theory in favour of a new approach that is more consumer-biased. It has been pointed out by some that several jurisdictions have enacted legislation prohibiting the use of unfair terms in consumer contracts since the 1970s because of the consumer protection movement that swept the world.²⁹⁸ The present legislative trend, especially in European countries, towards unfair terms is to rebalance the undertakings in contracts concluded between professionals and consumers whenever the will of one party dominates the contract and imposes terms detrimental to the consumer.²⁹⁹ Thus, if one is to propose a legislative overhaul of the control system of unfair terms in Kuwait, then the first step towards reform should be the

²⁹⁸ Among these countries are Sweden in 1971, Denmark in 1974, the German Federal Republic in 1976, the UK in 1977, France in 1978 and Austria in 1979; see Ewoud Hondius, 'The Legal Control of Unfair Terms in Consumer Contracts: Some Comparative Observations' in Thierry Bourgoignie (ed), *Unfair Terms in Consumer Contracts* (Louvain-la-Neuve 1983), pp. 38–40.

²⁹⁹ Art. 3 of the Directive provides: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". The article constitutes the backbone of the unfairness test in the Directive and has been transposed verbatim into the internal legislations of several EU members, the UK is one example. See regulation 5 of the UTCCR.

abandonment of the traditional theory of adhesion contracts and the establishment of a new framework for protection that takes into account the developments in modern contract law.

A modern trend has emerged in recent years calling for the adoption of a more liberal concept of adhesion contracts that accommodates the necessities of consumer protection.³⁰⁰ The new trend focuses on the mechanism of concluding adhesion contracts rather than the causes for their existence, and requires the fulfilment of two criteria that could lead to the impairment of freedom of contract and suppression of private autonomy: (i) unilateral preparation of the contract terms and (ii) absence of negotiations.³⁰¹ This understanding seems more consistent with the wording and the purpose of Art. 80 KCC as these two features are the only features that are explicitly provided by the code for existence of adhesion contracts. The code does not refer to monopoly or essentiality of the good or service as the traditional theorists require. Therefore, any additional feature that has not been expressly mentioned in the code should be rejected because it is an unjustifiable deviation from Art. 80 and lacks any proper statutory basis.

2.5 Conclusion

The freedom to contract in contract theory remains of supreme importance. However, it is not without restrictions. The law gives individuals the freedom to arrange their own affairs by mutual agreement but, at the same time, provides means to redress any injustice that might arise out of the contract. The fact that the adhesion contract is monopolized by one of the parties who has stronger bargaining power exposes the adhering party to the risk of accepting unfair terms against his will. For this reason, the law has permitted the courts to intervene in favour of the adhering party and to eliminate the unfair terms. Therefore,

³⁰⁰ Husam Al-Ahwani, 'Consumer Protection in the Framework of the General Theory of Contract' (Consumer Protection in Sharia and Law Conference, (UAE, 6-7 December 1998) (in Arabic).

³⁰¹ Husam Al-Ahwani, *Sources of Obligations* (no publisher 1992) (in Arabic), p. 79; Mohammad Zahra, *Sale of Buildings under Construction* (Kuwait, Kuwait University 1998) (in Arabic), p. 96 *et seq.*; Ahmad Al-Refai, p. 8; Mohammad Abdulthaher Hussain, p. 52.

judicial review is one of the most important means of consumer protection against unfair terms. However, it has been presented in this chapter that the current concept of adhesion contract as regulated by the Kuwaiti Civil Code, and as adopted by the courts and jurists is unsuited to counter the problem of unfair terms in consumer contracts. On the one hand, the code lacks necessary measures to safeguard the adhering party's consent and reinforce his position prior to the conclusion of the contract. On the other hand, the current prevailing understanding of adhesion contract that covers a few contracts only and excludes consumer contracts from its purview is contrary to the wording of Art. 80 and the regulatory trend of controlling unfair terms. It has been submitted that this understanding should be abandoned in favour of a more rational and liberal approach that adequately protects the adhering party whenever he is prevented from influencing the substance of the contract. Indeed, the scope of the concept of adhesion contracts should be broadened and be a general umbrella that protects weak parties in all non-negotiable agreements regardless of the type of the contract, whether consumer, tenancy, labour and so forth. However, to provide optimum protection for consumers the researcher believes that it is time to introduce consumer-specific regulation and to recognize consumer contracts as a discrete category of contracts, just like labour and tenancy contracts, to address their inherent weaknesses and protect them against the abuses of businesses.

Chapter Three: Discovering the Meaning of Unfair Terms in the KCC

3.1 Introduction

For any control system of unfair terms to achieve an adequate level of protection, it not only requires the existence of a mechanism for controlling unfair terms, but also the effectiveness of such mechanism. The effectiveness of the mechanism depends a great deal on the clarity and certainty of the concept of contractual unfairness, and the existence of criteria for its assessment. The previous chapter was concerned with the problem of the definition of adhesion contract the courts have provided. This chapter will discuss another problem caused by the KCC and is related to the vagueness of the standard of contractual unfairness. Although the code has established, in Art. 81, a system for the protection against unfair terms and permits the courts to review unfair terms in adhesion contracts, it does not clarify how or when a certain contractual term can be labelled as unfair. Therefore, this chapter will attempt to formulate a standard of contractual unfairness consistent with the KCC drawing on comparative law.

3.2 Problems associated with the concept of unfairness in the Kuwaiti Civil Code

3.2.1 The ambiguity of the concept of unfair terms

Certainty is crucial in law-making. One way to achieve this end is to establish clear notions of technical concepts to avoid potential ambiguities. Definitions and standards are important because they explain the ideology that underpins a certain legal concept, and serve as direction posts for the application of the rule of law and determine its scope.

The first observation that can be made as to the regulation of unfair terms in Art. 81 KCC is that it does not elaborate on the notion of contractual unfairness or the criteria for

its assessment.³⁰² Whether or not a certain contractual term is regarded as being unfair depends, to a significant extent, on the meaning given to it. The lack of statutory standard of unfairness is a major cause of the weakness in the control system.

Before attempting to define unfair terms, it is important first to provide a taxonomy of contractual terms to understand their position in the KCC in relation to other contractual terms. By *terms* is meant those provisions that the parties insert in their agreement to determine its content with a view to creating rights or obligations.

3.2.1.1 *Valid terms*

As a consequence of the theory of the autonomy of the will, individuals are free to decide the contract terms that best suit their interests.³⁰³ The code recognizes the parties' freedom to include any term they assent to, unless it is against public order or good morals or not statutorily prohibited.³⁰⁴ Apart from these three restrictions there is no limitation on the parties' contractual will. The general rule in contracts is that all consensual terms are principally permissible and enforceable except if the contrary is shown by one of the parties.

3.2.1.2 *Invalid terms*

In contrast to valid terms, the code declares the invalidity of certain contractual terms, although limited in number, by prohibiting their inclusion in contracts either explicitly,

³⁰² Art. 81 KCC reads: "If the contract is concluded by way of adhesion and includes unfair terms, the court may, upon the request of the adhering party and in accordance with the rules of equity, amend the terms to alleviate unfairness or relieve the adhering party from their application even if he is aware of their existence. Any agreement to the contrary of this provision shall be deemed null".

³⁰³ Once the terms of the contract are agreed upon, then the contract generates a binding force because it is the expression of the parties' free will. Art. 196 KCC provides: "Contract is the law of the parties; neither can individually revoke nor alter its rules except where permitted by agreement or statute".

³⁰⁴ Art. 175 KCC.

such as terms stipulating an interest in loan agreements between non-merchants,³⁰⁵ or implicitly if the terms contradict statutory provisions, public order or good morals.³⁰⁶

Invalid terms cannot be enforced because they do not actually exist from a legal viewpoint. Hence their invalidity can be declared by the court on its own motion without application by the parties. If the invalid term is separable from the rest of the agreement, then it alone will be invalidated without having an effect on the validity and the enforceability of the remaining provisions. The law gives the courts the authority to avoid invalidity by attempting to preserve the contract whenever possible from nullification by excluding the illegal part. Such act of judicial review is referred to as *inqas* (reduction of contract) whose purpose is to ensure the stability of transactions and to protect the expectations of the parties.³⁰⁷

However, if the invalid term is inseparable from the contract or is indispensable to one party, then the entire contract will fall apart and be rendered void. The rationale behind this is that if the term is of special value to one of the parties, then this term is not merely an additional element in the contract, but rather is the "motivating cause" of the agreement. If the cause is illicit, then it will eventually lead to the nullification of the entire agreement as the contract is missing an essential requirement.³⁰⁸

3.2.1.3 *Unfair terms*

Pinpointing an accurate meaning for the concept of unfair terms is not an easy task. The absence of a definition in the code has blurred the dividing line between unfair terms, on the one hand, and valid and invalid terms, on the other. It appears from the wording of Art.

³⁰⁵ Art. 745 KCC.

³⁰⁶ The court has discretionary power to determine when a term breaches the law, public order or good morals.

³⁰⁷ Ibrahim Abu Allail, 'The Scope and Conditions for the Reduction of Juridical Acts' (1987) 11(2) *JouroL* 11, p. 39.

³⁰⁸ Art. 176 KCC states: "A contract is void when a contractor is obligated without a cause or for an illicit cause"

81 that the code does not consider unfair terms always to be *per se* unlawful. Rather, their inclusion in contracts is generally permissible and ought to be complied with according to the principle of freedom of contract. However, because they render the contract inequitable, the code allows the courts to intervene and address the injustices they produce either by their attenuation or elimination.

The principal provision in the code that deals with unfair terms is Art. 81 concerning Contracts of Adhesion. It reads:

"If the contract is concluded by means of adhesion and includes unfair terms, the court may, upon request from the adhering party, amend such terms to alleviate their unfairness or entirely relieve him from them even if he was aware of such terms. All with what the rules of justice require. Every agreement to the contrary of this article shall be deemed void".

The Explanatory Notes to the Civil Code comment on this article but without explaining their meaning. Rather, it adds more ambiguity to the concept by describing in a very broad language what would make contractual terms unfair: "if they are inconsistent with honour and integrity that should prevail in transactions or with what the observance of good faith requires".³⁰⁹ Unfair terms are mentioned again in Art. 784(b) relating to insurance contracts: "any of the following terms appearing in a policy of insurance shall be null: (b) any unfair term, the breach of which appears to have no effect on the occurrence of the insured risk". The code here expressly invalidates unfair terms but again does not explain their meaning.³¹⁰

³⁰⁹ Explanatory Notes to the Civil Code, p. 95.

³¹⁰ Unfair terms also appear to in two other statutes. In the Maritime Trade Code (Law No. 28/1980) in Art. 272(4) Concerning Maritime Insurance where the wording is exactly the same as the wording in the aforementioned Art. 784(b) KCC. They are also referred to in Art. 60 (*bis* B) of Law No. 68/1980 concerning the Commercial Code, repealed with Law No. 10/2007 Concerning the Protection of Competition, on the abuse of dominant position which reads: "If a trader abuses its dominant position, the court may, upon request of the injured party, order compensation, amend the contractual unfair terms, or relieve him entirely

The omission of definition can be interpreted as a deliberate choice by the drafters as they realized the difficulty of formulating a succinct and precise definition appropriate for inclusion in the code, preferring to leave the task to the courts should the occasion arise. It seems there is a pattern in the Civil Code, though not absolutely consistent, to eschew definitions of legal concepts³¹¹ in favour of broad or abstract terminology, leaving it to the judiciary to fill in the gaps. This approach may find its reasoning in the fact that the drafters did not want to restrict the courts' interpretative authority and bind them to one meaning, and preferred to leave them a broad margin of discretionary power to construct the notion of unfairness according to their own understanding and the circumstances of each case. In this way, the law is left flexible, permitting the courts considerable autonomy to deliver justice within the framework of the code. However, a survey of case law shows that the courts have repeatedly refrained from determining the meaning of unfair terms even when the end result is their nullification.³¹²

While it is true that abstraction of certain legal concepts in statutes may be necessary to give the courts some degree of latitude in interpreting the law and establishing precedents, absence of a clear definition of problematic notions would normally present two disadvantages. First, it renders the law uncertain until the courts build up a significant body of case law on the meaning of the concept; a process that could take a considerable length of time. Second, it opens the door to various, and possibly conflicting, meanings, especially in judicial decisions when coherence in judicial interpretation of complex legal concepts is necessary.

Leaving the notion of unfairness undefined might lead to further negative outcomes. The notion of contractual unfairness in Kuwaiti law is relatively recent and had

from such terms". The main purpose of this article is not to protect consumers, but to address unfair competition, and to ensure fair and free competition in the market by suppressing any anti-competitive conduct and abuse of dominant position by incumbent businesses.

³¹¹ Such as, public order, good morals, good faith, integrity and fair dealing.

³¹² In one of the few cases, the Court of Cassation annulled an "exclusion from indemnity clause" in the course of its review of an insurance contract on the grounds of it being unfair but did not delve into the meaning of the unfairness. However, the decision did state that the reason for the clause nullification was because it contradicted the gist of insurance and violated the public order, Com. Cass. No. 650/99, 9/4/2000.

not received much judicial consideration before the enactment of the code in 1981, and the possibility of developing a narrow notion of unfairness that limits the scope of protection cannot be completely ruled out.³¹³ Therefore, legislative determination of the notion of unfairness is necessary to avoid any ambiguity or dispute that may arise as to its meaning. In other jurisdictions such as, the UK, France and Germany, judicial determination of the notion of unfair terms preceded the enactment of any regulatory legislation. The treatment of the notion of contractual unfairness was first assumed by the courts before legislative intervention took place where the courts had to eliminate unfair terms under the general principles of contract law. The courts' attitude has led to the establishment of sound legal precedents and, subsequently, the development of a theory of unfairness over the course of several years, which was later incorporated into statutes.³¹⁴

The introduction of a comprehensive standard of contractual unfairness would also facilitate the categorisation of all unfair terms under the umbrella of one concept. That would not only enhance the weak contractual position of consumers against businesses, but also contribute to the certainty and clarity of the law, and the consistency of judicial decisions.³¹⁵ Any reformation of the present control system of unfair terms in Kuwait should elaborate on the concept and standard of contractual unfairness to maximize legal certainty and effectiveness of protection.

³¹³ See also Gemei's opinion in support of this argument, Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 247.

³¹⁴ For instance, this is the case in France, see Martin Ebers, 'Unfair Contract Terms Directive (93/13)' in Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier 2008), p. 209.

³¹⁵ A look at comparative law strengthens the researcher's argument as several jurisdictions have already included a test for unfair terms in their national legislations. See, for example, Art. 3 of the Directive; Regulation 5 of the UTCCR in the UK; Art. 31 of the Belgian Act of 14 July 1991 on Commercial Practices and Consumer Information and Protection; Art. 35 of the French Law 78-23 of 10 January 1978; Art. 1437 of the Quebec Civil code; Section 9 of the German *AGB-Gesetz* 1976.

3.2.1.4 Doctrinal definitions of unfair terms

The legal uncertainty created by the absence and ambiguity of the concept prompted some authors to analyse the concept and formulate a definition of unfair terms. Naturally, the definitions they proposed differ and there is no agreement on one definition. Despite the differences, it is noticeable that they all centre around the concept of *imbalance* that they create between the rights and obligations of the parties. These definitions can be separated into two categories:

The first category includes definitions that address the question of unfairness from a pure contract theory perspective by focusing on general principles in contract law such as good faith, fair dealing, integrity, justice and public order. Some contract law theorists relied on these general principles to formulate a definition. Abdulbaqi, for example, proposes the following definition: "terms are unfair if they are contrary to the spirit of right and justice that should prevail in transactions".³¹⁶ Another author embraces a similar definition: "unfair terms are those terms which contradict with honour, integrity and good faith".³¹⁷ However, these definitions suffer from two problems. First, they are too generic as they are founded on principles that are required in all contractual relations. Second, they fail to provide an accurate sense of the concept of unfair terms because they merely negate the opposite.

Other contract law theorists have been more conscious about the concept of unfairness, and articulated less generic definitions by emphasizing notions such as "contractual equality" and "excessive benefit"³¹⁸ but without specifying the basis of unfairness.

³¹⁶Abdulfattah Abdulbaqi, *The Theory of Contract and Unilateral Will* (Cairo, Nahdhat Masr 1984) (in Arabic), p. 212.

³¹⁷ Ibrahim Abu Allail, 1998, p. 181.

³¹⁸ Unfair terms are those terms "imposed by the offeror on the offeree in a manner inconsistent with due contractual equality to achieve an extra benefit in comparison to the obligation he owes that result in a burden on the offeree that lack any benefit", Mohammad Al-Khatib, 'The Judge's Power of Amending the Contract

The second category of definitions deals with the concept of unfairness from a consumer law perspective, referring to objective criteria such "abuse",³¹⁹ "excessive advantage",³²⁰ "contractual imbalance"³²¹ and "superiority of contractual position".³²² Therefore, unfair terms have been defined as follows:

1. Terms imposed upon a non-professional or a consumer by a professional through the abuse of his economic power in order to receive an excessive advantage.³²³
2. Any pre-drafted term by a party possessing economic power to gain an extra advantage vis-à-vis the obligations of another party.³²⁴
3. Terms that are imposed by a strong party by virtue of its economic power to achieve significant imbalance at the expense of the other party.³²⁵
4. Another author describes unfair terms as terms that exist in contracts imposed by a more experienced and economically stronger party, and cause an imbalance between the rights and obligations in favour of the stronger party.³²⁶

These definitions are far more accurate than the definitions put forth by the contract theorists because they take into consideration three important elements: (i) the cause, (ii) the purpose and (iii) the effect of unfair terms. The cause is the inequality in the bargaining power between the parties, which distracts the offeree – usually a consumer – from any meaningful choice and prevents him from opposing the terms. The unfair character of the term becomes more evident when the contract is prepared by an

under Yemeni, Egyptian and Islamic Laws' ((PhD thesis), Cairo, Aim Shams University 1992) (in Arabic), p. 217.

³¹⁹ Al-Sayed Omran, p. 27 *et seq.*

³²⁰ Ibid., Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 308; Ahmad Al-Refai, p. 1151; Said Abdussalam, p. 50; Omar Abdulbaqi, p. 402; Ahmad Rabahi, 'The Protection of the Contract Parties against Unfair Terms' ((PhD thesis), Wahran University 2008) (in Arabic), p. 27.

³²¹ Ahmad Al-Refai, *ibid.*; Omar Abdulbaqi, *ibid.*, Ahmad Rabahi, *ibid.*

³²² Ahmad Al-Refai, *ibid.*, Said Abdussalam, *ibid.*; Omar Abdulbaqi, *ibid.*

³²³ Al-Sayed Omran, p. 32. Clearly this definition has been influenced by the French definition of unfair terms and reproduced the definition as set out in the *loi Scrivener* of 1978.

³²⁴ Said Abdussalam, p. 50.

³²⁵ Omar Abdulbaqi, p. 403.

³²⁶ Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 308.

economically superior and more competent party, such as a business. The purpose of imposing unfair terms is the excessive advantage the offeror seeks to derive at the expense of the consumer. The end result of imposing unfair terms would be an imbalance between the rights and obligations of the parties.

3.2.2 The objective scope of protection against unfair terms

One of the problems of the control system of unfair terms as articulated in the KCC lies in the objective scope of the application of the rules. As explained in the previous chapter, the protection against unfair terms is confined to those terms contained in adhesion contracts. The objective scope of adhesion contracts as defined in Art. 80 of the code is determined by two limitations: (i) the advance preparation of the terms and (ii) the impossibility of negotiation. In this respect, the code and the Directive follow the same approach to defining the objective scope of protection, since both pieces of legislation restrict the scope of application to non-negotiated terms that have been formulated prior to the formation of the contract.

The discussion of the regulation of the objective scope of protection in the Directive is useful because it makes it possible to highlight the deficiencies in the Kuwaiti law and offer proposals on how to improve protection against unfair terms.

3.2.2.1 A comparison between the approach in the Kuwaiti law and European Union

Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts

Although both pieces of legislation do not define what constitutes a non-negotiated term or contract, they differ in two respects. First, the scope of the Directive is broader than the Kuwaiti law because it does not limit the protection to adhesion contracts only, but rather

extends the protection to cover "pre-formulated individual terms" prepared by the professional even for a single transaction only, provided that it was not negotiated.³²⁷ Unlike the Kuwaiti law, the Directive provides a greater level of protection by taking a term-by-term approach whereby the court will assess each term independently.

Second, the Directive is more specific and accurate than the Kuwaiti law because it uses the notion of ability to influence the terms as a basic criterion to determine when a term has been individually negotiated.

Art. 3(2) of the Directive provides that the term "shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of pre-formulated standard contracts".³²⁸ Here, the Directive establishes the notion of inability of the consumer to influence the substance of the term as a fundamental criterion to determine when a term has not been individually negotiated. It supports this criterion by introducing an absolute presumption³²⁹ of absence of negotiation whenever the term has been formulated in advance and gives standard contracts as a typical example. These two elements are cumulative requirements that must be met together in order to recognize absence of negotiation.

In contrast, according to Art. 80 of the Kuwaiti Civil Code, the defining features of adhesion contracts are the advance preparation of the terms and absence of negotiations. Art. 80 provides: "It does not preclude the existence of the contract if acceptance comes in the form of adherence of one party to the will of another by the delivery to a *pre-formulated and non-negotiable model agreement drafted by the offeror* [emphasis added]".

³²⁷ Art. 3(1). The "pre-formulated individual terms" is a new category of contract terms created by the Directive. It lies between standard terms and negotiated terms, and was mainly introduced to soften the strong German opposition of the commission's proposal to control the scope, which was intended to catch all unfair terms, whether negotiated or not; see Hans-W Micklitz, 'German Unfair Contract Terms Act and the EC Directive 93/13' in Julian Lonbay (ed), *Enhancing the Legal Position of the European Consumer* (British Institute of International and Comparative Law 1996), p. 180.

³²⁸ Art. 3(2).

³²⁹ Mário Tenreiro and Karsten Jens, 'Unfair terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive' in Hans Schulte-Nölke and Reiner Schulze (eds), *Europäische Rechtsangleichung und Nationale Privatrechte* (Nomos 1999), p. 235.

It appears from the wording of Art. 80 that the notions of pre-formulation and non-negotiation of the contract are two requirements that must be satisfied together in order to recognize the state of adhesion. The satisfaction of one requirement is not sufficient because the code perceives the adhesion contract as a one-sided contract in which the contractual process is concentrated in the hands of the offeror in the form of dictation of terms of the contract and refusal to negotiate.

The KCC does not elaborate on the meaning of *pre-formulation* or *non-negotiation*, but the courts³³⁰, supported by most commentators³³¹, developed a narrow interpretation of the two notions in the context of their discussion of adhesion contracts as to mean absolute independence of the offeror in formulating the terms and total absence of negotiation. They view the adhesion contract as a mass contract in which the offer is characterized by its generality, which requires standardization of the terms to cover a multitude of transactions and is addressed to an undetermined number individuals. This means that the adhering party always plays a negative role where his choice is limited to either accepting or refusing the terms.

However, Art. 80 and its interpretation by the courts and commentators raises some questions and criticism over the lack of clarity of the wording and its ambiguity.

i. The meaning of pre-formulation

Similar to the Directive, the code uses the notion of pre-formulation of terms as one of the criteria to define the adhesion contract and the Directive uses it to discern non-negotiated terms. However, the scope of application of the Directive in this respect is wider than the code where it is sufficient for a single term to be drafted in advance in order to enjoy protection against that particular term, even if the rest of the agreement is negotiated.

³³⁰ In courts' decisions; see, for example, Com. Cass. No. 217/95, 24/11/1996; Com. Cass. No. 101/89, 2/11/1998. In scholarly writings see Abd-Alrazzaq Al-Sanhuri, p. 293; Ibrahim Abu Allail, p. 179.

³³¹ See the discussion in chapter three in relation to the traditional theory of adhesion contracts.

Compared to the Directive, the Kuwaiti Code requires the whole contract to be prepared in advance in order to regard it as an adhesion contract and so qualify for protection against unfair terms.

The wording of Art. 80 reveals a weakness in its legal drafting as it requires that the contract be drafted by the offeror. The literal interpretation of this article suggests that the contract has to be issued by the offeror himself otherwise it would not be regarded as an adhesion contract. Accordingly, it could be argued that if the contract is drafted or made on the basis of a third party contract, such as a trade association, then it would not be an adhesion contract because the offeror did not initiate the terms himself. This is a loophole that can be exploited by businesses to circumvent judicial control of unfair terms by using a model contract formulated by a third party.

Issues such as this caused hot debate in Germany prior to the implementation of the Directive where it was questioned whether terms presented by the offeror, but drafted by third parties such as notaries and solicitors, could be regarded standard terms and, consequently, subject them to the *AGB-Gesetz*. The question had not been resolved until the implementation of the Directive, which extends the protection to any pre-formulated contract drafted by any party other than the consumer. This rule has been incorporated into section 310(3)(1) of the BGB, which contains a presumption that attributes all standard terms to the business party unless the consumer puts them forward.³³² The significance of this amendment is that terms drafted by a third party are automatically imputed to the professional.³³³

In Kuwaiti law there is a need to close this loophole and remove the requirement of formulation of the terms by the offeror and ascribe all terms to the offeror whether drafted by him or a third party.

³³² "Standard business terms are deemed to have been presented by the business party, unless they were introduced into the contract by the consumer".

³³³Norbert Reich, 'The Implementation of Directive 93/13/EEC on Unfair Terms in Consumer Contracts in Germany' 5 ERPL 165, p. 165, at p. 169; Hans-W Micklitz, pp. 180–181.

A further related observation is that the use of phrases such as ‘drafted’ and ‘model contract’ in Art. 80 entail that the terms must be in writing in order for the adhering party to invoke protection; this puts the applicability of the law on oral terms under suspicion. It might be rare, but not inconceivable, for some terms to be oral and presented to the adhering party on a take-it-or-leave-it basis, such as when a seller stipulates orally over the telephone that the consumer agrees to exempt or limit his liability. It is unclear in this case whether protection would cover orally incorporated terms in adhesion contracts with the explicit reference of Art. 80 to written terms.

In this regard the Directive provides a greater level of protection by embracing a broad concept of *pre-formulated terms* to cover even unwritten terms. Although a first read of the Directive may suggest that it is only applicable to written terms because it, too, uses the phrase ‘drafted’ in Art. 3(2), a closer look at its preamble reveals otherwise.³³⁴ Recital 11 to the Directive emphasises the fact that “The consumer must receive equal protection under contracts concluded by *word of mouth* [emphasis added] and written contracts”. This means that the phrase ‘drafted’ in the Directive should be understood in a wider sense to mean ‘prepared’.³³⁵ Similarly, in the UK the courts adopt a broad notion of ‘standard form contract’ and held that the phrase was wide enough to include any contract whether “wholly written or partly oral”.³³⁶

ii. Non-negotiation versus inability to influence the terms

The two pieces of legislation approach the effects of the idea of absence of negotiation from different perspectives. If one looks at the Kuwaiti law, one finds that it is content with the idea of the refusal of the offeror to negotiate the contract as a criterion to determine

³³⁴ E. H. Hondius, ‘The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States’ 3 ERPL 241, p. 242, at p. 246.

³³⁵ It could be said that the reason for using the word ‘drafted’ is that it is hard nowadays to imagine a non-written consumer contract as almost all such contracts are written in advance by professionals and Recital 11 was inserted to avoid any dispute that might arise regarding the coverage of oral terms.

³³⁶ *McCrone v Boots Farm Sales Ltd* 1981 SC 68 per Lord Denpark at 74.

absence of negotiation. It has been judicially and scholarly established that the notion of non-negotiation in Art. 80 means total absence of negotiation because the generality of the offer in adhesion contracts necessarily entails making it on take-or-leave basis.³³⁷

In this regard, the Directive is more precise than the Kuwaiti law as it uses the notion of inability to influence the pre-formulated terms as a determining factor in the absence of negotiations. The significance of this specificity is that mere discussion of the terms is not sufficient to declare a term as having been individually negotiated, but rather the adhering party must have an opportunity to change the terms in order to acknowledge the existence of negotiations.

Indeed, the requirement of refusal to negotiate the contract in Kuwaiti law is susceptible to abuse by professionals and facilitates the circumvention of the rules. The offeror may enter into fictitious negotiations with the consumers or agree to make minor amendments to the contract to purport that the contract has been negotiated and evade control of the unfair terms.

Nonetheless, in either piece of legislation it is not always easy to draw a clear line and distinguish between negotiated and non-negotiated terms because the two ideas tend to overlap with each other. In practice the distinction becomes tricky and less clear, such as when the professional explains the terms for the consumer and offers him a free choice between two or more pre-formulated terms. On the one hand, it could be argued that the terms fall within the scope of the law as the terms have been pre-formulated in advance but, on the other hand, a contrary view may be advanced that although the terms are indeed pre-formulated, the consumer has been able to influence the substance of the term by deciding what to include.³³⁸

In the context of the Directive more complex questions may arise, such as what sort of negotiation activity is required to purport that a term has been individually

³³⁷ See the cases cited in chapter three, section 4.2 and the commentaries cited in their favour.

³³⁸ For this meaning, see Nicholas Lockett and Manus Egan, *Unfair terms in Consumer Agreements : The New Rules Explained* (Wiley 1995), p. 22.

negotiated? And what level of influence must be exerted in order to achieve individual negotiation?

Obviously, one cannot speak of individual negotiation and exclusion of protection when the two parties engage in negotiation but ultimately disagree and leave the terms unmodified because the consumer has not been able to exert any influence. However, is it possible to regard a term as being individually negotiated if the two parties argued over a particular term and the consumer manages to reformulate the term but the modified term achieves the same effect or is detrimental to his interests? Or when the consumer has been offered a genuine opportunity to influence the disputed terms but declines to take an action?

It is difficult to answer these abstract questions but a look at national traditions may make it possible to find proper answers. If one looks at the case law in Germany and the UK one could say that the courts take a fairly strict approach to the interpretation of the notion of individual negotiation.³³⁹

In Germany there was a discussion about what constitutes an individually negotiated term. Some academics hold that in order for a standard term to be considered as being individually negotiated, it is not sufficient that it is negotiated and amended but rather the amendment has to be in favour of the consumer in order to admit that it has been individually negotiated.³⁴⁰ Other authors, however, adopt an opposite view and maintain that nothing prevents an unmodified standard term from being negotiated as the parties may thoroughly discuss the term but ultimately agree to leave it as is.³⁴¹

If these two views are compared, it seems to the researcher that the second opinion carries more weight than the first because the contractual wills of the negotiating parties may coincide without the terms having to be amended if the terms turn out to be

³³⁹ It is worthwhile noting that in France the Code de la Consommation offers comprehensive protection against unfair terms, and does not differentiate between negotiated and non-negotiated terms; see Art. L132-1.

³⁴⁰ Mário Tenreiro and Karsten Jens, p. 237.

³⁴¹ Ibid.

reasonable and fair to both parties. This opinion can be supported with reference to a decision by the BGH where it established that for a term to be regarded as being individually negotiated, the customer must fully understand the terms and appreciate their legal consequences.³⁴² This decision implicitly means that a term can be deemed individually negotiated even if it was not modified, so long as the receiving party negotiated the terms and freely accepted their legal ramifications. However, this does not mean that the BGH takes the notion of individual negotiation lightly. In an earlier decision it emphasized that mere opportunity to influence the terms does not amount to individual negotiation and when the consumer is offered a choice between specific alternative terms, then this does not mean that he has influenced the terms.³⁴³

Similarly, in the UK the courts appear to impose a high threshold for accepting a term as having been individually negotiated³⁴⁴ and in some cases they appear to adopt a stricter notion of individually negotiated terms than their German counterparts.

In *UK Housing Alliance Ltd v Francis*³⁴⁵ the Court of Appeal ruled that the opportunity to consider and negotiate the terms does not mean that the terms have been individually negotiated, even if the consumer was offered professional advice by his solicitor. Citing Regulation 5(2)³⁴⁶ of the UTCCR, the court held that "this therefore imposes an absolute prohibition on a finding of individual negotiation if there has not been an ability to influence the substance of a term. It does not follow from the existence of the ability to influence the substance of a term that the term has, in fact, been individually negotiated. That is still a matter for the supplier to prove".³⁴⁷ This means that neither the negotiation activity alone nor the mere existence of ability to influence the substance of the

³⁴² BGH, 19 May 2005, NJW 2005, 2543.

³⁴³ BGH, 3 December 1991, NJW 1992, 50. In this case the BGH held that free choice between alternative terms on its own does not render a term individually negotiated.

³⁴⁴ Christian Twigg-Flesner, 'The Implementation of the Unfair Contract Terms Directive in the United Kingdom' 8 CIL 235, pp. 235–61, p. 245.

³⁴⁵ *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117.

³⁴⁶ The wording of Regulation 5(2) is comparable to its origin in Art. 3(2) of the Directive. It provides: "A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term".

³⁴⁷ At [19], per Longmore LJ.

term are sufficient in regarding a term as having been individually negotiated. The courts have frequently refused to embed the notion of 'standard terms of business' under UCTA in a rigid formula and interpreted it in a rather flexible manner. Here are some examples: it was held that the negotiated general conditions of contract remained standard if untouched by the negotiation,³⁴⁸ that small variations of the standard terms will not make the terms negotiated,³⁴⁹ and that the contract is essentially still made on the defendant's standard terms if amended but the amendments are 'narrow and insubstantial' or 'immaterial'.³⁵⁰

Such a pro-consumer protection position may sometimes seem unfair to the professional such as when he offers the consumer a real opportunity to review and influence the content of the terms but the consumer willingly accepts the burden of the terms. It could be argued that in this case the consumer does not deserve protection against these particular terms because the requirement of ability to influence the terms was present. However, the case law in England shows that the courts will look closely at whether the consumer had a *real* ability to influence the terms.³⁵¹ Some commentators have argued that this is the most reasonable interpretation of Art. 3(2).³⁵² This meaning resonated in the statement made by the Law Commission on Unfair Terms in its Consultation Paper in which it maintains that "for any negotiations to be meaningful, the customer must genuinely understand the proposed term and must be able to assess its possible impact".³⁵³ Therefore, as in the situation in Germany, amendment of terms is not always necessary in determining whether a term has been individually negotiated as the matter is of fact and degree, and the consumer is protected against pre-formulated terms, so long as he has not been able to exert influence over them. Consequently, where the consumer had such an ability and the professional was open to amending the pre-formulated terms, then the terms

³⁴⁸ *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

³⁴⁹ *Pegler Ltd v Wang (UK) Ltd* [2000] EWHC Technology 127.

³⁵⁰ *Watford Electronics Ltd v Sanderson CFL Ltd* [2000] 2 All ER (Comm) 984.

³⁵¹ Mindy Chen-Wishart, *Contract law* (Oxford University Press 2012), p. 413.

³⁵² Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Aldershot, Ashgate 1997), p. 92.

³⁵³ Law Commission and Scottish Law Commission, *Unfair Terms in Contracts*, (A Joint Consultation Paper Law, Commission Consultation Paper no 166/Scottish Law Commission Discussion Paper no 119), (2) 2002 at para 4.50.

can be regarded as having been individually negotiated regardless of whether or not they have been amended, provided that the consumer had a real possibility to influence the substance of the terms. Of course, the burden of proof is incumbent on the professional who has to show that such genuine opportunity was offered.³⁵⁴

All in all, both in Germany and in the UK the notions of negotiation and influence have to be interpreted in a restricted way, and unmodified terms should never be regarded as having been individually negotiated without qualification as this contradicts with the general rule as provided in Art. 3(2) of the Directive.³⁵⁵

iii. Assessment of the limitation of protection to non-negotiated terms

While it is accepted that individually negotiated terms are less likely to be unfair than standard terms, there may, nonetheless, be plausible reasons for extending the control to negotiated terms. The consumer may not always genuinely understand the terms and assess their possible impact due to incomprehensibility, inaccessibility, inequality of bargaining power and so forth. Therefore, should the present objective scope of protection against unfair terms as articulated in the Kuwaiti law and the Directive be broadened to cover negotiated terms too?

It is worthwhile mentioning that the original proposal of the Directive was prepared with a view to covering all consumer contracts whether standardized or negotiated.³⁵⁶ However, owing to the divergences between the control models and their functions in the Member States,³⁵⁷ strong disagreement ensued between the delegates and prevented them from reaching consensus on the scope of application. Germany, in

³⁵⁴ Art. 3(3) of the Directive puts the burden of proof of negotiation on the professional.

³⁵⁵ The use of the word 'always' implies that pre-formulated terms are, as a general rule, not negotiated.

³⁵⁶ See the Commission's 1990 proposal OJ 1990 C243/3.

³⁵⁷ According to Wilhelmsson and Willett, the regulatory models of unfair terms in the Member States can be categorised into four basic models: (i) the '*no particular problem model*' that was implemented in the UK prior to the enactment of the Unfair Contract Terms Act 1977, (ii) the '*standard form contract model*' that was introduced by the German Standard Terms of Business Act of 1976, the '*consumer protection model*' (iii) followed by the French *Loi Scrivener* 1978, and (iv) the '*general fairness model*' contained in the Nordic contract law; see Thomas Wilhelmsson and Chris Willett, p. 165 *et seq.*

particular, opposed the extension of the application of the Directive to negotiated terms as its law, the *AGB-Gesetz* 1986, was restricted to standard contracts only. It has also been argued that the extension of the scope of control to cover individually negotiated terms would represent a ‘drastic restriction’ of the principle of private autonomy and the economic functions of the freedom of contract.³⁵⁸ This argument is based on the idea that the contract is viewed as an important tool that enables private law subjects to participate in the market to achieve a correct result without regulatory incursion by the state. Hence, any limitation on the freedom of contract would dilute the free market economy and lead to its proper functioning being hampered.³⁵⁹

One would have to admit that from a pure contract law perspective the extension of the objective scope of protection conflicts with the principle of freedom of contract. However, the removal of the negotiated terms restriction may be seen from a consumer protection perspective as a very desirable development. Several countries, such as Denmark, France, Sweden and Finland, include negotiated terms within the scope of their laws without any problems.³⁶⁰ In the UK the Law Commission reviewed the exclusion of negotiated terms and proposed that the protection regime should apply to both negotiated and non-negotiated terms because of the considerable uncertainty over the notion of individually negotiated terms and failure of the consumer to realize the implications of negotiation.³⁶¹ Similarly at the EU level, following a Green Paper launched by the commission in 2007, a clear majority of the Member States supported extending the scope to negotiated terms and argued that individual negotiation of terms did not put the

³⁵⁸ Hans Erich Brandner and Peter Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ 28 CML Rev 645, p. 652. This particular article had a considerable influence on the final draft of the Directive, see Law Commission and Scottish Law Commission, *Unfair Terms in Consumer Contracts: A New Approach?*, issues paper, 25 July 2012, p. 23.

³⁵⁹ Law Commission and the Scottish Law Commission, *Unfair Terms in Consumer Contracts: A New Approach?*, issues paper, 25 July 2012, p. 23.

³⁶⁰ Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (A Joint Consultation Paper Law, Commission Consultation Paper no 166/Scottish Law Commission Discussion Paper no 119), (2) 2002, para 4.53.

³⁶¹ Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292 Cm 6464, Scot Law Com No 199), 2005, para 3.50 *et seq.*

consumer in a stronger position, since the professional possessed more knowledge and expertise in negotiating terms.³⁶²

The exclusion of individually negotiated terms from control, according to some, has a minimal impact on consumers because almost all consumer contracts are pre-formulated.³⁶³ However, this view disregards the fact that professionals may abuse the exemption and bring about negotiations over the terms to evade the application of the rules. Even if the consumer willingly accepts negotiation of the terms, he may not be able to assess the implications of negotiation because of his inherent weakness, be it economic, legal or intellectual. Even if he is able to appreciate the full implications of the terms, it is unlikely that he will have sufficient bargaining power to amend them. In practice businesses see the exemption of negotiated terms as a loophole.³⁶⁴ It has been empirically proven that businesses frequently attempt to manipulate negotiations so as to avoid having their unfair terms subject to control,³⁶⁵ and there are cases where the terms were purported to have been individually negotiated but the influence of the consumer was questionable.³⁶⁶

In sum, if the purpose of the law is to protect the weak party in the transaction, then it is doubtful that a negotiation process based on the imbalance of the bargaining power of the parties can ensure a fair result. In the researcher's opinion this is sufficient reason to extend the objective scope of protection against unfair terms in the Kuwaiti law to cover negotiated consumer contracts.

³⁶² *Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis, Commission Staff Working Paper*, para. 4.7

³⁶³ Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts', p. 239

³⁶⁴ See *OFT Response to the Law Commission Issues Paper, OFT 1456, November 2012*, pp. 47–48.

³⁶⁵ Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292 Cm 6464, Scot Law Com No 199), 2005, para 3.156.

³⁶⁶ OFT 1456, p. 47.

3.3 Attempt to find a basis for the concept of unfairness in the KCC

3.3.1 In search of the meaning of unfairness

Since Art. 80 of the code concerning unfair terms does not spell out a definition of unfairness nor provide criteria to judge when a particular term is unfair, one might be able to determine their meaning by looking into other provisions in the code. A viable solution would be to deconstruct the phrase ‘unfair’ (or ‘abusive’ if translated literally) and attempt to find its root within the code, if any. A quick search in the code reveals that the notion of ‘abuse’ is referred to in the regulation of the theory of abuse of rights in Art. 30. Owing to the similarity of the terminology used, the theory of abuse of rights might help to explain the meaning of unfair (or abusive) terms. However, before venturing into this task, it is useful first to review the notion of contractual fairness from the perspective of the French law, since the Kuwaiti approach of protection and control of unfair terms has been influenced by the French theory of adhesion contracts.

3.3.2 A comparative review of the concept of unfairness

The concept of unfair terms under the Kuwaiti law is comparable to that adopted in the French law by reason of the fact that the theory of adhesion contract was developed by the French judiciary. The explanatory note³⁶⁷ to the KCC explains that the regulation of theory was inspired by the Egyptian Civil Code in (Art. 100) which, in turn, was heavily influenced by the French judicial and jurisprudential understanding of the theory.³⁶⁸ Therefore, it seems that the Kuwaiti legislator intended to transplant the theory and the underlying concepts that it is grounded on. It is useful, therefore, to explore the French law in an endeavour to determine the meaning of unfair terms.

³⁶⁷ See pp. 93–94.

³⁶⁸ Abd-Alrazzaq Al-Sanhuri, p. 293 *et seq.*

In determining what constitutes an unfair term, the French law adopted an approach that revolved around the notion of excessive advantage that the professional sought to derive at the expense of the consumer. This is evident in Art. 35 of the Act of 1978,³⁶⁹ also known as *loi Scrivener*, which defines *unfair terms* as "those terms imposed on the consumer by an abuse of economic power (*abus de la puissance économique*) by the professional to derive an excessive advantage (*avantage excessif*)".³⁷⁰ The law establishes a causal link between these two criteria as the excessive advantage cannot be gained without the abuse of the economic power. Some have held that these two elements are cumulative and must be satisfied together before a clause can be characterized as unfair (*abusive*).³⁷¹ However, some authors have contended that in practice the requirement of abuse of economic power seems superfluous because the two criteria tend to overlap with each other as the excessive advantage is always presumed to have been imposed through the abuse of economic power.³⁷²

In spite of the inclusion of these two criteria in Art. 35 of the *loi Scrivener*, it can be said that the concept of unfair terms was surrounded by some vagueness and imprecision. The two criteria served as a general definition or guidance for the Commission of Unfair Terms (*Commission des Clauses Abusives*) which then may recommend to the Council of State the prohibition or amendment of certain unfair terms.³⁷³ No contractual term could be classed as unfair until the commission declared it so. In practice this contributed to the proliferation and continued use of unfair terms in the

³⁶⁹ Loi n° 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services. Art. 35 became Art. L132-1 of the Consumer Code of 1993 (Code de la Consommation) which was amended in 1995 as a result of the implementation of the Unfair Terms Directive.

³⁷⁰ Hélène Bricks, pp. 10–11.

³⁷¹ François Terré, Philippe Simler and Yves Lequette, p. 339.

³⁷² Jean Calais-Auloy, 'Les Clauses Abusives en Droit Français' in Jacques Ghestin (ed), *Les Clauses Abusives dans les Contrats Types en France et en Europe, actes de la table ronde du 12 décembre 1990* (Librairie Générale de Droit et de Jurisprudence 1991), p. 117; Paolisa Nebbia, 'Unfair Contract Terms' in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010), p. 222.

³⁷³ Art. 38.

French market.³⁷⁴ The failure of the law to prevent and control unfair terms can partly be ascribed to the broad definition of unfair terms which proved to be problematic and flawed for the reasons cited below.

First, the association between the imposition of unfair terms and the abuse of economic power is not accurate as the professional may not be in a superior economic position but is still able to impose unfair terms on the consumer due to the latter's lack of knowledge or need, for example. Conversely, the professional may be a large corporation and occupy a dominant position in the market but is unable to impose unfair terms because of its fear of losing its customer base or damaging its reputation.³⁷⁵

This shows that the criterion of the abuse of economic power as provided by Art. 35 seems to lack clarity, especially where the law has avoided giving a definition for the phrase 'economic power' and disregarded including a test for its measurement. It is, it seems, for this reason that the French Consumer Code 1995 omitted the criterion of abuse of economic position and required the satisfaction of one criterion only.³⁷⁶ However, the removal of reference to 'abuse of economic power' has been said to have little significance as the Court of Cassation³⁷⁷ ruled that the abuse of economic power was inherent in all unfair terms in contracts concluded between professionals and consumers.³⁷⁸

Secondly, it is not clear what 'excessive advantage' denotes nor how it should be measured as the law has not provided a mechanism that can be used to assess the

³⁷⁴ Some authors estimated that thousands of unfair terms in consumer contracts were, in effect, even four years after the promulgation of the law. Jean Calais-Auloy and Luc Bihl, 'Valuation of Legislative Attempts on Unfair Terms in Consumer Contracts in France' in Thierry Bourgoignie (ed), *Unfair Terms in Consumer Contracts : Legal Treatment, Effective Implementation and Final Impact on the Consumer* (Louvain-la-Neuve 1983).

³⁷⁵ Atef Abdulhamid Hasan, p. 99; Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, pp. 270–271.

³⁷⁶ The 1995 amendment is considered a significant improvement on the control system of unfair terms in France. It refined the cumbersome double test of unfairness by eliminating the 'abuse of economic power' criterion and substituting the criterion of 'excessive advantage' with 'significant imbalance', thus creating more legal certainty. Marie-Odile Thiry-Duarte, 'Rapport sur l'application Pratique de la Directive 93/13/CEE en France' (The Directive on 'Unfair Terms', Five Years Later- Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999); Sophie Vigneron, 'The Implementation of the Unfair Contract Terms Directive in France' 8 CIL 105, p. 105.

³⁷⁷ Cass civ (1), 6 January 1994, D.

³⁷⁸ Hugh Beale and others, pp. 816–817; François Terré, Philippe Simler and Yves Lequette, p. 340.

advantage the professional generates at the expense of the consumer. Against this omission, it seems that the nature of the excessive advantage should be understood generally to include any advantage that creates unjustified imbalance in the rights and obligations of the parties and not confine it to monetary advantages only. Moreover, this criterion creates an additional issue concerning how the excessive advantage should be measured. Should the assessment be made in relation to the term in question in isolation of the rest of the agreement or it should be made in the light of the whole contract;³⁷⁹ in other words, in determining the unfairness, should the term that caused the imbalance be considered alone or in the context of the rest of the obligations the contract imposes on each party? It seems to the researcher that the second interpretation is more appropriate because while it is true that one term when read alone may manifest imbalance between the performances of the parties, the whole contract may, upon analysis, reveal terms that are to the benefit of the counter-party, which makes the contract balanced on the whole. So, while on the face of it, a disclaimer of warranty clause may look unfair, under certain circumstances it could be considered to be fair if compared to another contractual clause, such as when the stipulator offers a reduction in price in exchange for the disclaimer of warranty clause.³⁸⁰ However, the evaluation of the fairness or unfairness of a particular clause may prove to be difficult in some situations, such as when the compared obligations are of a different nature.³⁸¹

The third remark that can be made on the French regulation of the test of unfairness is that the law did not specify which party bore the burden of proof of showing the unfairness. Was this omission an error? Apparently not. The silence may be interpreted according to the general principles in civil procedure which provide that the burden of

³⁷⁹ Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 269.

³⁸⁰ See also, Hélène Bricks, p. 113.

³⁸¹ The question of evaluation of the imbalance and the difficulties it engenders is addressed in Art. 4 of the Directive. Paragraph (1) provides that the process of assessment of a an unfair term should take into account the nature of the goods or services, the time of conclusion of the contract, the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. This article was transposed into the French consumer code in Art. L132-1.

proof is incumbent on the party who is making the allegations; the consumer in this case. If this inference is correct, then the law places a high burden on the consumer who has to prove not only the excessive advantage, but also the superior economic position of the professional.

3.3.2.1 *The theoretical basis for the test of unfairness in French law*

The use of the phrases '*abus de la puissance économique*' and '*clauses abusives*' and their connotations in the *loi Scrivener* caused a division of opinion among academics as to what is meant by '*abus*' in Art. 35, which the law used as a basic test for determining the state of unfairness.

It has been advanced by some that the notions of abusive clauses and abuse of economic power are associated with the notion of abuse of the situation (*l'abus de situation*) which involves the exploitation of the consumer's weak position by virtue of the professional's superior economic position which enables him to impose abusive terms in his favour.³⁸² Thus, if the professional imposes unfair terms on the consumer by using his dominant position in the market or by taking the consumer by surprise and initiates the contract negotiations such as in doorstep selling, then he is abusing the position he is enjoying. Here, the abuse of position can be compared to the notion of coercion, which vitiates the consent of the offeree because of his lack of meaningful bargaining power and is bound to accept the terms of the contract due to his ignorance or desperate need for the product offered by the professional.³⁸³ However, other scholars have rejected this argument on the basis that the regulation of the notion of abuse of the situation was intended to deal with special cases.³⁸⁴ It is not possible, therefore, to deduce a general legislative prohibition of abuse of a situation from these specific rules because the notion

³⁸² Jacques Ghestin, '*L'abus dans les Contrats*' 2 *Gaz Pal* 379, p. 379.

³⁸³ Ghestin, cited in Ahmad Al-Refai, p. 217; Ahmad Rabahi, p. 352.

³⁸⁴ Such as, the Ordinance of 1 December 1986, which prohibited the abuse of a dominant position in the market and Art. L. 121-21 of the Consumer Code 1993 concerning Door-Step Sales to Consumers.

of the abuse does not amount to a discrete theory that can be extended and applied from the specific cases it was intended to confront.³⁸⁵

Other authors, however, argue that the notion of *clauses abusives* in Art. 35 has its roots in the traditional theory of abuse of rights (*abus de droit*), which is essentially concerned with placing limitations on the exercise of rights. Therefore, according to this view, abuse of the contractual rights occurs when the professional is apparently acting in accordance with his right to draft the contract but is, in fact, abusing the exercise of such right to generate unjustified excessive advantage. However, envisaging the imposition of unfair terms as an abuse of right has been opposed on the grounds that the theory of abuse of right is not applicable in contractual matters and that the unilateral drafting of a contract is not an exercise of a subjective right, but is rather an exercise of a *de facto* power.³⁸⁶ In addition, it has been asserted that the theory is too subjective to have a place in the theory of contract and leaves an overabundance of discretion in the hands of the judiciary.³⁸⁷

3.3.3 The pure concept of unfairness in the KCC

Unfair terms in the KCC can literally be translated as ‘abusive terms’. The word *abuse*, in Arabic *ta’assuf* or تعسف, has a robust link to the word *right* and refers to the excessive or wrongful exercise of a right that resulted in the violation of the rights of others. When the offeror in adhesion contracts imposes an abusive term on the consumer, he is actually abusing his right to formulate the terms of the contract. This is apparently the reason behind subjecting unfair terms to judicial review.³⁸⁸ The notion of abuse is not mentioned in the code outside the context of adhesion contracts, except in Art. 30 concerning the regulation of the doctrine of abuse of rights. This article provides that the exercise of rights

³⁸⁵ Abbas Karimi, p. 212; Ahmad Rabahi, pp. 352–353.

³⁸⁶ Ghestin, p. 601 cited in Al-Refai, p. 217.

³⁸⁷ David Angus, ‘Abuse of Rights in Contractual Matters in the Province of Quebec’ 8 McGill LJ 150, p. 154.

³⁸⁸ This conclusion can be deduced from the wording of the, *The Explanatory Notes to the Civil Code*; see p. 95.

is unlawful if the holder deviates from the purpose of the right or the social function it intends to fulfil. The article enumerates four instances or criteria that can be employed to judge whether or not an exercise of a right has been abusive: (i) if the right is exercised to generate an unlawful interest, (ii) if the right is exercised with the sole intention of causing damage to others, (iii) if the interest desired is disproportionate to the damage caused to others and (iv) if the exercise of right inflicts gross and exceptional damage on others. However, the conception of abusive exercise of rights in the code is not confined to these four criteria as the code cites them as examples of abuse of rights and sets a general standard of abuse that all right holders must not exceed when exercising their rights, that is, the teleology of the right and its social function.

The doctrine of abuse of rights was regulated in the code to sanction the abnormal, excessive or abusive use of a right. The code, as with most modern codes in other jurisdictions, does not acknowledge the absolute nature of the rights of the individual and subject their exercise to certain limitations and to the supervision of the courts.³⁸⁹ A landlord is entitled to enjoy and dispose of his property as he deems fit. However, he is not allowed to exercise his right by, for example, erecting a wall on his property solely to block his neighbour's window, otherwise he would be abusing his right of property. The KCC acknowledges the concept of *relativity of rights* and proscribes abusive exercise of rights; for example, it provides in Art. 810 that the proprietor is entitled to use his property, exploit it and dispose of it according to the law. Any harm the proprietor inflicts on others in the course of his wrongful use of his right gives rise to liability to remedy the injured party on the basis of delictual liability.³⁹⁰

The theory of abuse of right is essentially the creation of the courts and legal theory. Its natural cradle was the right of property because such right has always been

³⁸⁹ Ibid, p. 26.

³⁹⁰ Art. 227.

regarded an absolute right.³⁹¹ Nowadays, it is undisputed that all individual rights are relative and the law holds the proprietor to be delictually liable for any harm his unlawful use of the right may cause to others. The classical examples in the Arab legal literature of the doctrine of abuse of rights are mainly associated with property rights.³⁹² However, the theory is not limited to property law and extends to all areas of law. It has been recognized and applied to rights arising from various sources, such as labour relations in the case of unfair dismissal, landlord–tenant agreements in the case of the removal of a tenant without just cause, intellectual property rights and abuse of procedural rights in litigation.

If this is the case, could the notion of unfair terms in the KCC be founded on the theory of abuse of rights? If yes, what criteria can be used to ground the liability of the professional and what regime of liability does the abuse of contractual right give rise to: is it contractual or delictual liability?

Before attempting to answer the questions above, it would be helpful to shed some light on the regulation of the theory in the Kuwaiti Civil Code.

3.3.4 The regulation of the theory of abuse of right in the KCC

The basic principle in the theory of abuse of rights is simple. It provides that, as a general rule, the exercise of a right is a legitimate act so long as the right holder does not exceed the limits set by the law. If the right holder exceeds the normal exercise of the right, then he is abusing his legal rights, making him liable to repair the damages he causes with his act.

The concept of *abusive use of rights* is not a creation of modern jurisprudence. While a general principle of abuse of rights had not been defined until the beginning of the twentieth century, traces of the concept can be found mainly in the field of property law in

³⁹¹ Jean Limpens, Robert Kruithof and Anne Meinertzhagen-Limpens, 'Liability for One's Own Act' in Andre Tunc (ed), *International Encyclopedia of Comparative Law*, vol XI (Mohr 1979), pp. 2–235.

³⁹² See, for example, Ibrahim Abu Allail, *The Theory of Right* (Kuwait, Dar Alkutub 1997) (in Arabic), p. 328 *et seq.*

Roman law,³⁹³ ancient French law³⁹⁴ and in Islamic law.³⁹⁵ The courts in France played a central role in the development of the theory and limiting the excessive exercise of rights.³⁹⁶ The principles of the theory were later shaped at the hands of jurists such as Josserand, Saleilles and Duguit, who challenged the idea of absolutism of rights.³⁹⁷ The evolution and application of the theory has grown significantly since the beginning of the twentieth century and has been accepted as a viable recourse against the unlawful use of rights. The continual development of the theory by the courts eventually translated into legislation, and it now permeates public and private law alike.³⁹⁸

Josserand's thesis, of all the proponents of the abuse of rights theory, had the greatest influence on the Kuwaiti drafters, who endorsed the idea of relativity of rights, their social function and that the abuse of rights should be judged against the function it was meant to serve. The influence of the social function theory is evident in the Kuwaiti legal system and occupies paramount position. It amounts to a general constitutional principle and has been embodied in the Kuwaiti Constitution in art (16) which provides: "Property, capital and labour, are fundamental constituents of the social structure of the

³⁹³ H. C. Gutteridge, 'Abuse of Rights' 5 CambLJ 22, p. 31.

³⁹⁴ Henri Mazeaud and Andre Tunc, *Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle*, vol Vol 1 (5th edn, Paris, Montchrestien 1975), para 556, p. 646.

³⁹⁵ Abd-Alrazzaq Al-Sanhuri, p. 696.

³⁹⁶ The French courts sanctioned the abusive use of rights as early as 1855 to disallow the exercise of property rights to injure a neighbour (Court of Colmar, 2 May 1855, D.P. 1856.2.9). However, its recognition and development has been hampered as the legal thinking during this time was imbued with the spirit and ideals of the French revolution.

³⁹⁷ The theory was met with strong opposition in the nineteenth and twentieth century. French scholars, such as Planiol, argued that the term 'abuse of rights' was self-contradictory (*contradictio in terminis*) and does not convey any rational meaning. Rights, in his view, are always in conformity with the law and cannot be abused, and once they are abused, they cease to exist. In addition to Planiol, Ripert argued that the emphasis on the social orientation of rights and law against individualism would deprive the individual from his subjective rights. For a review of these views, see Vera Bolgar, 'Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine' 35 LaLRev 1015; Zimmermann and Whittaker, Good faith in European Contract Law: Surveying the Legal Landscape, in Reinhard Zimmermann and Simon Whittaker, ft. 166 and ft. 169, p. 34.

³⁹⁸ The term 'abuse' is widely used in public and private law, such as 'abuse of rights', 'abuse of power', 'abuse of dominant position', 'abuse of corporate assets' and 'abusive (unfair) terms'; also see Vera Bolgar, 'Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine', pp. 1018–1023.

state and of the national wealth. They are all individual rights with a *social function* as regulated by the law."³⁹⁹

The importance of the social function of rights has been confirmed in Art. 30 KCC, which ties the legality of the exercise of private rights to the ends the individual seeks to fulfil. The code does not envisage private rights as ends in themselves, but rather means to achieve social objectives. Accordingly, private rights exist only to serve social interests and legal prerogatives are recognized so long as they are exercised in accordance with their social purpose. Any exercise that departs from the legitimate function of the right or is contrary to the social objective of the right should not be protected by the courts.

3.3.5 The criteria for determining the abusive exercise of rights

The Kuwaiti theory of abuse of rights is founded on the notion of fault and employs the behaviour of the reasonable person with an average intelligence as an objective test for the measurement of such behaviour. The holder of the right should observe and not deviate from such behaviour.⁴⁰⁰ If he deviates from such behaviour, then his deviation is considered a fault that will attract liability, even if the exercise of the right did not go beyond the bounds of the right.⁴⁰¹ The holder of the right may seem to do exactly what he is entitled to, while, in fact, he is using his rights contrary to their social aims.

The theory of abuse of rights is founded on delictual liability on account of the fact that abuse represents a fault that gives rise to liability and entitles remedy. The code broadens the scope of fault to encompass not only illicit, but also abusive acts. However, an exercise of rights will not be regarded as abusive if the holder did not deviate from the purpose or the social function of the right. This is the general standard.

³⁹⁹ The explanatory note to the constitution explains that the statement that these rights fulfil a social function was meant to regulate the function of these rights for the benefit of the collectivity besides the proprietor's. The goal of the social regulation of property is to prevent damage to the interests of the collectivity or abusing its use.

⁴⁰⁰ Ibrahim Abu Allail, *The Theory of Right*, p. 327.

⁴⁰¹ Abd-Alrazzaq Al-Sanhuri, p. 703.

Besides this general standard, Art. 3 KCC provides four criteria or instances in which the exercise of right is deemed unlawful.

The first criterion is when the right is exercised to secure an unlawful interest, such as when an employer uses his contractual right to dismiss an employee because he disagrees with his political orientation or when a landlord requests a tenant to vacate a property after failing to raise the rent.⁴⁰² In this case the right does not deserve legal protection since its holder seeks an unlawful interest under the guise of an ostensible legitimate exercise of right. This means that from the perspective of the law, it is not sufficient that the interest the right holder seeks to achieve is apparent or beneficial, but it must also be consistent with the purpose of the right. The scope of the unlawfulness of the interest should be understood in a broader context to encompass any act that is contrary to public order and good morals. The explanatory notes to the code provide that "interest is unlawful not only when its achievement is in breach of the law but also when it contradicts with the public order and moral".⁴⁰³

The test in assessing whether the use has been lawful in this case is objective, where the court will examine the exercise of the right in accordance with the behaviour of the reasonable person. This is a clear application of the notion of fault because it is the right holder here who deviates from the behaviour of the normal person to use his right in order to secure an unlawful interest. However, while the basic test for measuring the legality of the right holder act is essentially objective, the court might also take the intention of the right holder into consideration in determining whether the right has been abused.⁴⁰⁴

The second criterion is when the right holder exercises his right for the sole intention of inflicting harm on another, that is, he is exercising his right for a purely malicious motive, such as when a person plants trees on his property exclusively to block

⁴⁰² Ibid. p. 706.

⁴⁰³ , *The Explanatory Notes to the Civil Code*, p. 28.

⁴⁰⁴ Mohammad Abdulthaher Hussain, pp. 276–277.

sunlight from reaching his neighbour's house or when an employer dismisses an employee because he testified against him in court. To establish abuse of rights in this case, it must be demonstrated that the right holder intended to injure another in the course of his exercise of the right (i.e., subjective test).⁴⁰⁵ The determining factor in this case is that the right holder's primary motive must be to inflict harm on another, even if such exercise brought some advantage to the right holder by accident.⁴⁰⁶ Because the intention to harm is an internal, mental state, it might be too difficult or impossible for the injured party to prove it. Therefore, the court may, in some cases, rely on other factors to determine the malicious intent, such as the absence or triviality of interest.⁴⁰⁷

The third criterion of abuse of right arises when the interest derived from the exercise of right is flagrantly disproportionate to the damage caused to another. This case is close to the previous one. However, the abuse is easier to prove in this case as the plaintiff does not have to show the malicious intent of the right holder. However, it is not enough for him to show on the balance of proportionality that the damage equates or slightly outweighs the interest achieved by the right holder, but it must show that such disproportion is significant (i.e., objective test).⁴⁰⁸ The code does not provide for a criterion for the evaluation of the disproportion between the interests of both parties, leaving the assessment to the exclusive discretion of the court according to the circumstances of each case.

The last criterion provided by Art. 30 is that of gross and exceptional damage. This case is directly derived from Islamic jurisprudence and finds its natural field of application in the area of the rights of neighbours and disturbances of neighbourhoods.⁴⁰⁹

The code does not elucidate what constitutes gross and exceptional damage but, instead,

⁴⁰⁵ Hasan Keerah, *Introduction to Law* (Alexandria, Monshaat Almaaref no date) (in Arabic), p. 773; cf. Abd-Alrazzaq Al-Sanhuri, p. 703.

⁴⁰⁶ Hasan Keerah, *ibid.*

⁴⁰⁷ Mohammad Abdulthaher Hussain, p. 272; Hasan Keerah, *ibid.*

⁴⁰⁸ An intention to harm (subjective element) may also be involved in some situations as such abusive exercise of right creates a strong presumption of the bad faith of the right holder, but it is not necessary to prove it as the objective suffices.

⁴⁰⁹ The Explanatory Notes to the Code, pp. 28–29.

the explanatory notes to the code refer to Art. 1199 of the Ottoman Civil Code, the Majallah, Al-Ahkam-i-Adliya (the Majallah).⁴¹⁰ Gross damage, according to the Majallah, consists of any act that causes damage to a building, in terms of weakening it, causing it to collapse or making it impossible for it to be put to the use for which it was originally intended.⁴¹¹ However, the term should not be limited to the examples provided by the Majallah and be understood in a broader context to encompass every damage that inhibits or significantly reduces the injured party's enjoyment of his legal entitlement, such as when a factory that discharges soot and unpleasant fumes is built in a residential area, and has the effect of seriously endangering the residents' health and convenience.⁴¹²

Additionally, while the main area for the application of this case is the right of property, nothing prevents the extension of this case to other fields of the law such as contract law. A party that insists on the literal performance of an obligation, even though such performance has been too onerous due to the occurrence of general contingencies that could not be predicted at the time of contracting, would be abusing his right according to this case.⁴¹³

Needless to say, insignificant or minimal damage caused as a result of the exercise of the right does not make the person liable for his action on the basis of abuse of rights as his behaviour was consistent with the conduct of the ordinary person according to an objective test. In any way, the intention of the right holder is immaterial in determining the abusive conduct.

⁴¹⁰ The Ottoman Majallah provides in Art. 1198: "Any person may raise the wall of his property owned in absolute ownership to any extent he wishes, and may do anything he desires, and, providing that he does not cause his neighbour any great (gross) damage thereby the latter cannot prevent him from doing so". The Majallah was the civil code of the Ottoman Empire based on the Islamic jurisprudence of the Hanafi School of Law. It is also the historical basis of the civil code in some Arab countries, such as Kuwait, Jordan, Syria and Iraq. It is worthwhile noting that although Islamic jurists refused the absolute nature of rights and condemned abusive exercises, abuse of rights has not been recognized as a theory. Some modern commentators argue that the notion of abuse of rights does not extend beyond relations between neighbours; see Chafik Chehata, 'La Théorie de L'abus des Droits Chez les Jurisconsultes Musulmans' 4 RIDC, pp. 217–224. Cf. Mahmoud Fathy, 'La Notion de L'abus des Droits dans la Jurisprudence Musulmane' (PhD thesis), impr. de A. Mulcey 1912).

⁴¹¹ See also, Hasan Keerah, pp. 778–779; Ibrahim Abu Allail, *The Theory of Right*, p. 330.

⁴¹² Hasan Keerah, p. 780, Ibrahim Abu Allail, *The Theory of Right*, p. 330. The possible applications of this case are unlimited; they may include a noisy neighbour, a garage, a barking dog and so forth.

⁴¹³ In support of this opinion, see Hasan Keerah, p. 780 nt. 1.

3.3.5.1 *Some remarks on the regulation of the theory in the KCC*

Although the regulation of the abuse of rights theory in the KCC has been inspired by the divergent French case law and Art. 4 of the Egyptian Civil Code, the drafters opted to adopt a different approach. Its codification reflects aspects of the two schools by blending both approaches into one article; the provision of a general standard of abuse, combined with applications that stem from Islamic Sharia rules.⁴¹⁴ On the one hand, it provides a general standard based on the social function of rights against which all exercises of rights will be measured. On the other, it follows the Egyptian Civil Code by enumerating cases derived from Islamic jurisprudence in which the exercise is considered unlawful.⁴¹⁵

The introduction of objective and subjective criteria for the assessment of abusive conduct is consistent with the general standard of social function of rights established at the beginning of Art. 30 and also with the purpose of using the code as a tool to realize social justice.⁴¹⁶ The combination of subjective and objective tendencies appears in other parts of the code, namely Art. 139 relating to interpretation of contracts, which gives effect to the letter of agreements and common will of the parties.

The code bases the abuse of rights on delictual liability by considering abuse to be one form of fault that gives rise to liability. It uses the objective criterion as the primary criterion for the assessment of the exercise of the right by refining the notion of fault and accepting several degrees of fault through widening its scope further to encompass not only the wrongful acts, but also any ostensible legitimate exercise of right that deviates from the normative behaviour of the reasonable person. The introduction of the objective

⁴¹⁴ See articles 26–29, 1198–1200, and 1212 of the *Majallah*.

⁴¹⁵ The Egyptian Civil Code does not provide a general standard of abuse but includes three cases or criteria in which the exercise of right would be considered abusive. The cases are: (i) intention to harm, (ii) disproportion between the desired interest and harm, and (iii) unlawful interest. The Kuwaiti code added a fourth case or criterion derived from Islamic law concerning gross and exceptional harm; see the explanatory notes, pp. 28–29. See Abd-Alrazzaq Al-Sanhuri comment on the social goal test and reason behind its exclusion from the Egyptian Civil Code, pp. 706–707.

⁴¹⁶ , *The Explanatory Notes to the Civil Code*, p. 29; Abd-Alrazzaq Al-Sanhuri, p. 127.

criterion also provides an important procedural advantage for the injured party because it relieves him of the troublesome question of proving the intention of the right holder.

However, it could be argued that the adoption of the social function of rights as a general standard for the determination of abuse raises a practical problem concerning the determination of the social function of each right as it is not easy to attempt to find out what the purpose was for which the right was created.⁴¹⁷ In addition, the adoption of such broad principle leads to legal uncertainty and arbitrary justice because it opens the door to conflicting judicial opinions according to the political, social and economic views of each judge.⁴¹⁸ While the researcher agrees that such concerns are valid, they are nonetheless exaggerated. First, the court will not necessarily have to discern the social function of each right but will rather concentrate on whether the exercise of the right seeks to fulfil a legitimate social end. In practice the court will assess the behaviour of the defendant by applying the objective criteria and comparing it with the behaviour of the ordinary person.⁴¹⁹ Secondly, case law shows no indication of arbitrary application of the rules, and even if such judicial vagaries existed, they can be deterred appropriately by the court of cassation, which supervises the correct application of the law and ensures unification of case law. It is true that the principle of social function of rights as a concept lacks precision, but one must not forget that flexibility and non-rigidity of legal rules are sometimes regarded as necessary to allow for just judgments in individual cases. Moreover, it should be borne in mind that while the provision of such a broad principle renders Art. 30 flexible, the drafters of the code provided four cases of abuse in order to increase the article's legal uncertainty.

⁴¹⁷ Abd-Alrazzaq Al-Sanhuri, p. 707.

⁴¹⁸ Henri Mazeaud and Andre Tunc, p. 658.

⁴¹⁹ See, for example, Com. Cass. No. 93/97, 9/3/1998.

3.3.6 The theory of abuse of rights in the sphere of contracts

Given the above discussion, it is clear now that the theory of abuse of rights is applicable to all sorts of subjective rights, including contractual rights. Contractual rights by nature are relative rights and their exercise is not discretionary, but is rather subject to the review of courts in case of abuse. While the parties are free to determine the content of their contract per the principle of freedom of contract by including any term they desire, the exercise of such freedom is constrained by three limitations: (i) statutory provisions, (ii) public order (iii) and good morals.⁴²⁰ This means that the contract drafter must abide by these three restrictions in determining the content of the contract and must avoid any abusive conduct as set out in Art. 30. Therefore, in relation to the applicability of the abuse of rights theory on contractual matters, one can deduce from Art. 30 that a party is abusing his right to contract in the following cases: if he imposes contract terms to derive an unlawful interest, if he imposes terms with the sole intention of inflicting harm on his counterpart, if the interest derived from the terms is disproportionate to the damage caused to his counterpart or if gross and exceptional damage is caused to the other party.

The flexibility of the regulation of the theory of abuse of rights in the KCC allows its application to extend to all contractual relations and to govern all the contract phases. The provision of the theory in the preliminary section of the code is indicative of the legislative will to promote it to the status of an overarching principle that governs all legal acts, whether contractual or extra-contractual. While the theory has been essentially developed to counter the abusive exercise of property right, its applicability in contractual matters is now widely accepted.⁴²¹ If one accepts that abuse is a misconduct or deviation from the normative behaviour of the ordinary person, then it can occur in the course of the exercise of any right, be it a property right or a contractual right.

⁴²⁰ Art. 175.

⁴²¹ Abd-Alrazzaq Al-Sanhuri, p. 695 *et seq.*; Abdulmonem Faraj Assada, p. 360; Abbas Karimi, p. 11 *et seq.*

3.3.6.1 *Admission of the theory of abuse of rights as a means to counter abusive exercise of contractual rights*

To make the analysis more specific, a distinction will be made between three phases in which contractual abuse may occur: (i) the formation phase, (ii) the execution phase and (iii) the termination phase.

i. Abuse of right in the formation phase

It is axiomatic in contract law that individuals are free to decide whether or not to contract and with whom to contract. However, the exercise of this freedom is not absolute and in certain situations refusal to enter into a contract may give rise to liability; for example, if the offeror is a monopoly in the provision of a good or service of a basic need to the general public, then its refusal to provide the good or the service would constitute an abusive behaviour because of the harm this would cause to the ordinary person.⁴²² Similarly, while the principle in contract negotiations is that the parties are free to break off the negotiations at any stage and refuse to conclude the contract, such act may attract liability if it causes losses to the other party. There is a moral and legal pre-contractual obligation on the parties to act in accordance with good faith and fair dealing. If a party breaks off advanced negotiations without a legitimate reason after his counterparty has

⁴²² In support of this opinion, see Assada, pp. 365–367. Al-Sada differentiates between refusal to sell by a legal monopoly and a factual monopoly. It is illegal for the first type to decline to provide good or service for any member of the general public as this is a legal obligation imposed on the monopoly by virtue of its contract with the state. Whereas in the case of factual monopoly there is no such legal obligation on the monopoly which can withdraw its offer at any time. However, the right to withdraw the offer is not absolute and has to be based on valid reasons, otherwise it would constitute an abuse of the right of not to contract. Also see Ghestin's discussion of the regulation of refusal to sell (*le refus de vendre*) in French law as a form of abuse in contractual matters, Jacques Ghestin, 'L'abus dans les Contrats', p. 379.

incurred significant expenditure thinking a contract would be concluded, then he would be liable on the ground of abuse of the right to negotiate.⁴²³

ii. Abuse of right in the execution phase

Of the contract phases, abuse of a contractual right mostly manifests during the execution phase of the contract. Here, a conflict of interests exists between a party who uses a contractual right and another who suffers from an injury caused by such usage. In adhesion contracts such a situation arises because his superior position enables the stronger party to dictate the terms of the contract that grant him exclusive rights which determine how the contract should be executed, thus putting the adhering party at his mercy.⁴²⁴ An example of this behaviour would be retaining the right to accept the employee's work or obliging the policy holder to report incidents that are irrelevant to the risk insured against in insurance contracts.

The idea of abuse of right in the execution of contract finds its grounds in the principle of good faith which obliges the parties to co-operate by taking into account the interests of the co-contractor and abstain from any act that might cause him injury.⁴²⁵ This requires the exercise of the contractual rights in accordance with what the other party reasonably expects and in a manner consistent with fair dealing.⁴²⁶ The KCC embraces a wide concept of good faith that not only emphasizes the parties' inner state of mind, but also requires them to practice it in their dealings. To ensure that the parties adhere to good

⁴²³ Mohammad Lotfi, *Civil Liability in the Negotiation Phase* (Cairo, no publisher 1995) (in Arabic), p. 77. It is worth noting that the Cassation Court in France declared in a famous case of that the liability for unjustified breaking off of negotiations is based on the doctrine of abuse of right and the decision to break off negotiations constitutes "an abuse of a right to negotiate". The court characterized the abuse as a fault that gave rise to delictual liability, see Cass. Civ. (3) 16/10/1973, D. 1974, IR 35. There is no explicit provision in the Kuwaiti Civil Code, nor a judicial decision that characterizes breaking off negotiations in a manner contrary to good faith as an abuse of right. However, nothing prevents the application of the theory on pre-contractual matters if the conditions for its applications are available.

⁴²⁴ Abdulmonem Faraj Assada, p. 368.

⁴²⁵ Ibrahim Abu Allail, *Contract and Unilateral Will*, pp. 293–294.

⁴²⁶ Ibid.

faith in real life, the code adds a duty of an objective character in the form of fair dealing.⁴²⁷ Therefore, in certain situations if the debtor requests a short extension of time for the performance of his obligation, the creditor cannot refuse his request if it was based on legitimate reasons, otherwise he would be abusing his right of performance. Equally, if the obligation can be performed in several alternative ways, the creditor cannot insist on the performance in a certain way if this way is more costly or cumbersome for the debtor.⁴²⁸

iii. Abuse of right in the termination phase

Finally, a contractual right may be abused in terminating or rescinding the contractual relationship. As a general rule, contracts can only be rescinded in the same way as in which they were created, that is, by the concurrence of two wills. However, in certain contracts the contracting parties may be granted the right to terminate the contract by unilateral will, such as in contracts for employment for an indefinite period. Nonetheless, the unilateral exercise of such right is not unconditional. From an historical perspective, exercise of the unilateral termination of contract for employment for an indefinite period was viewed as a discretionary right, which was exercised improperly by employers and caused injury to the employee.⁴²⁹ The application of the doctrine of abuse of rights has been extended to this area for the purpose of moralising the exercise of such right. As a result, protective measures were legislated, obliging the employer to practise his right fairly by giving the employee prior notice and choosing a proper time for dismissal.⁴³⁰ Failure to comply with these requirements would render the dismissal abusive and, hence, incur civil liability.

⁴²⁷ Art. 197.

⁴²⁸ Ibrahim Abu Allail, *Contract and Unilateral Will*, p. 294.

⁴²⁹ Jacques Ghestin and Gilles Goubeaux, *Traité de Droit Civil: Introduction Générale* (Librairie générale de droit et de jurisprudence 1994), pp. 780–781.

⁴³⁰ See Assada, p. 384–385; articles 44 and 46 of the Kuwaiti Law No. 6/2010 concerning Employment in the Private Sector.

3.3.6.2 *The theory of abuse of rights and unfair terms*

It has been argued by some that the theory of abuse of rights is inapplicable to unfair terms because the theory only applies to subjective rights. According to Ghestin, it seems more satisfactory to regard the unilateral drafting of contracts in the form of standardized contracts as a new contracting paradigm intended to speed up the contracting process than a subjective right. It is not clear, as he argues, whether the unilateral drafting of contracts should be considered an exercise of a subjective right where it is, in fact, merely an exercise of de facto power.⁴³¹ Therefore, the application of the theory of abuse of right is not justified in this area as the inclusion of unfair terms in standard contracts is not due to abuse of right.

One should concede that from this perspective the argument against the application the theory of abuse of right to unfair terms does carry some weight. The qualification of the imposition of unfair terms through unilateral drafting of agreements as an abuse of a contractual right seems imprecise, for the proferror is abusing, so to say, his freedom of contract, and the very term of abuse of rights demonstrates that the aim of the theory is to prohibit the wrongful exercise of rights and not liberties. Thus, abuse of liberties cannot be sanctioned by this theory.

It is necessary before attempting to address this argument, to shed some light on the meaning of the term *right* in order to determine whether the theory applies to the freedom of contract and, hence, to unfair terms. First of all, it is important to note that the KCC does not adopt a specific definition of the term *right*. This indeed seems paradoxical since the law that grants individuals the power to exercise their rights and sets limits for their exercise does not specify their meaning. The ambiguity and complexity of the concept of *right* appears to be the reason that prevented the Kuwaiti legislator from adopting a specific definition. Indeed, there has been much debate and disagreement among legal

⁴³¹ Jacques Ghestin, 'L'abus dans les Contrats', p. 383.

scholars over the definition of the term, many divergent definitions arose in the debate and there is no agreement on one definition.⁴³²

Without delving too deeply into the debate, it is sufficient to say that there are three major theories with regard to the definition of *right*. The first theory is ‘the will theory’ which stresses the power of choice of the right holder, viewing rights as a ‘protected choice’.⁴³³ This view was criticized and rejected on the grounds that rights can also be enjoyed by the mentally retarded and children, even though they have no will as such.⁴³⁴ As a result of the criticism directed at the will theory, an alternative theory emerged, namely the interest theory,⁴³⁵ which focuses instead on the notion of ‘interest’ that the right aims to protect and held that rights are a ‘legally protected interests’. The Belgian jurist Dabin, however, proposed that the concept of right should be understood as consisting of two elements: the first being *appartenance*, or a link between the subject and the object of the right; and the second element is *maîtrise*, or a power of control over the object of the right.⁴³⁶

Whether the concept of right is viewed as a ‘will’, an ‘interest’ or a combination of both, these theories demonstrate that there is no one correct definition and that the notion of the term is broad enough to admit different interpretations. There is no justification for limiting its meaning. Rather, it should be understood in a wider context to encompass any right that bestows powers on individuals. If any of the above definitions is accepted, then it is inevitable that the freedom of contract could be perceived as a legal right, for it is either a power granted by law or an interest protected by law or both. It derives its legitimacy from the Civil Code, which recognizes the individuals’ right to create

⁴³² For a review of these definitions and the arguments of each opinion, see Ibrahim Abu Allail, *The Theory of Right*, pp. 23–33; Hasan Keerah, pp. 431–443.

⁴³³ This theory can be traced back to classical theorists such as Savigny and Windscheid. It has been largely disputed and rejected because it is too individualistic, Hasan Keerah, p. 431.

⁴³⁴ Ibid.

⁴³⁵ Advocated by jurists such as Jhering, see Keerah a, p. 433 *et seq.* for review and assessment.

⁴³⁶ For a criticism of this theory, see Abu Allail, p. 29; Keera, p. 435 *et seq.* It is worth mentioning that some writers pointed out that the majority of Arab scholars were more inclined to Dabin’s definition of right, Mohammad Lotfi, *Introduction to the Study of Law* (6th edn, Cairo, no publisher 2008) (in Arabic), p. 426.

legal relationships. Hence, the opinion that perceives the process of contracting merely as a freedom disregards the fact that it is, at the same time, a statutory right.

This researcher's argument can be substantiated further with reference to two articles in the KCC that could be used to characterize the ability to contract as a right. The first is Art. 84 concerning individuals' capacity to contract. This article grants any person the legal right to enter into a contract so long as he is legally and mentally competent to create a binding agreement, and understands the nature and effects of his acts. The second article is Art. 175 which gives the parties the right to determine the content of their agreement and include any stipulation they consent to so long as it is not prohibited by law or is contrary to public order or good morals.

Therefore, if the freedom to contract is characterized as a legal right, then it surely can be subjected to the theory of abuse of right. If a party seeks to use the contract to impose his will on his counterpart with the effect of creating a significant imbalance between the rights and obligations of the parties, then the right is diverted from its social purpose, hence, it is abused. The consequence of such abusive behaviour is to deny the offeror legal effect of the abusive terms. If the terms in question are material and essential to the existence of the contract, then the entire contract will be void due to the absence of cause, which is a fundamental prerequisite for a binding contract.

3.3.6.3 Applicability of the abuse theory to unfair terms

How can one determine whether or not a contractual term is abusive? What are the criteria that can be taken into account to qualify a term as abusive?

An explanation of the concept of *unfair terms* in the light of the abuse theory entails a discussion of two questions: (i) What is the qualification of the offeror's behaviour? (ii) If the first question is addressed, then it is necessary to explain how the criteria of abuse as provided by Art. 30 can be applied methodologically to unfair terms?

i. Qualification of the offeror's behaviour

First, the conduct of the offeror who imposes unfair terms constitutes fault because it is a deviation from the normative behaviour of the ordinary contractor who should take into account the effects of his conduct on his co-contractor. It occurs when a contractor abuses his contractual power by either imposing an abusive term or wrongfully exercising a contractual right. If such behaviour brings no or limited benefit to the author in comparison to the injury it inflicts on his counterpart, then he has committed a fault that attracts civil liability. One must not forget that the KCC gives the theory of abuse of rights broad effect by linking it to a social function and teleological philosophy. Rights are afforded legal protection so long as they are performed to serve a legitimate interest and fulfil a social function; therefore, their exercise must remain within the scope as defined by the law. Rights are not absolute, and there are duties tied to them and limits for their exercise – even if not expressly mentioned in the code – determined by the general criterion of social function. Thus, if the right holder diverts from the social purpose of the right and exceeds its permissible scope, then he should be held liable because his behaviour constitutes a fault and, hence, an abuse of right.

In addition to the prevention of abusive behaviour, the KCC tends to moralize the behaviour of the contractors by imposing positive behavioural standards in the form of an internal standard of good faith coupled with an external standard of fair dealing.⁴³⁷ The inclusion of these two standards, besides the theory of abuse of rights, in the KCC can be interpreted as illustrations of the altruistic spirit that exists in the code, which aims to regulate the relations between individuals on a moral basis. Such a moralistic approach prohibits a contractor from behaving individually without taking into consideration the implications of his conduct towards his counterpart. Accordingly, the contractual rights

⁴³⁷ Art. 197 KCC: "the contract must be performed according to its stipulations in a fashion consistent with good faith and fair dealing".

should not only be performed in accordance with the law, but also the contractor should refrain from any act that may cause harm to his counterpart in the course of his exercise of that right.

The offeror who imposes unfair terms is using the contract contrary to the purpose and social function for which it was intended, namely as a tool of exchange between contractors. Some writers have described such behaviour as abusive,⁴³⁸ for the offeror in adhesion contracts exploits his superior economic position to coerce the consumer into accepting his terms. However, it has been maintained that this type of coercion does not amount to a defect of contract that causes the nullity of the contract because it is connected to economic rather than psychological or moral factors.⁴³⁹

The contract should be seen as a collaborative and co-operative arrangement that should serve the interests of both parties. In contractual matters the KCC seeks to promote social justice by surrounding the principle of autonomy of the will with several restrictions for the benefit of the collective by protecting the weak contractual party whenever the contractual balance is upset. It seeks to preserve individuals' freedom of contract but not at the expense of the weak parties. In the words of Al-Sanhuri: "The society is concerned with the protection the weak party vis-à-vis the strong party. We have seen this in adhesion contracts, exploitation theory, theory of unperceived contingencies, labour contracts, insurance contracts".⁴⁴⁰ It undermines the institution of contract when one party disregards the social justice aims of the contract and uses it for the sole purpose of pursuing self-interests at the expense of his co-contractor. This co-operative nature should not be neglected, even if the law recognizes the unilateral drafting of contracts as an exceptional contractual paradigm such as in standardized contracts. The legislative acceptance of the

⁴³⁸ Solaiman Murkus, p. 184.

⁴³⁹ Ibid. Abd-Alrazzaq Al-Sanhuri, pp. 293–294. It should be noted that not any coercive act necessarily leads to the nullity of the contract. Rather, the coercion must have determined the consent of the party constrained and the constraint must be illegitimate by the use of force or threat to use force. For this reason economic coercion does not vitiate the consent of the consumer, see articles 156–158 of the Kuwaiti Civil Code; , *The Explanatory Notes to the Civil Code*, pp. 145-149 ; Ibrahim Abu Allail, *Contract and Unilateral Will*, p. 383.

⁴⁴⁰ Abd-Alrazzaq Al-Sanhuri., p. 127.

elimination of the negotiation process in adhesion contracts was intended to facilitate the conclusion of mass contracts but, in reality, professionals exploit the process to insert terms that benefit them. In practice, the superior contractual position of the offeror enables him to dictate terms that have the object or effect of gaining an advantage that would cause damage to the consumer, such as terms that give the professional the right unilaterally to modify the terms of the agreement relating to price, duration or the quality of the good or service. The conduct of the offeror in this case is analogous to the conduct of a proprietor who insists on growing tall trees on his property that would block the rays of the sun from his neighbour. In both cases the conduct is abusive and, hence, unlawful. Therefore, the offeror who imposes unfair terms on his inferior counterpart by virtue of his superior contractual position to gain an excessive advantage with a view to creating a significant imbalance between the rights and obligations of the parties is thus abusing his right to contract.

ii. Application of abuse criteria to unfair terms

Secondly, the fundamental test and the four criteria of abuse of right as provided in Art. 30 can indeed guide act as guides in determining when a certain contractual term is abusive. If the four criteria are applied, a contractual term can be deemed abusive if the offeror seeks to derive an illegitimate interest, intends to harm the co-contractor, if it creates a flagrant disproportion between the interest and the damage, and if it causes exceptional damage to the other co-contractor. With the exception of the third criterion, the researcher believes that it is difficult to envisage an unfair term in consumer contracts that does not fall within the purview of one of these criteria.⁴⁴¹ It should be stressed that the criteria provided are by no means exhaustive as the code sets them as examples of abuse, and establishes the

⁴⁴¹ It is hard to imagine a situation where a supplier or a professional imposes an unfair term for the sole purpose of harming his clients. If such a term was inserted into a contract, then it could be nullified on the basis of absence of a licit cause.

concepts of the ‘teleology’ and ‘social function’ of the right as two fundamental standards against which the exercise of all rights must be judged. Consequently, if the contract is utilized for the pursuit of the offeror’s egotistic interests instead of the common good of the parties to the transaction, then it deviates from its purpose and social function as a tool of exchange to become an abusive practice and an oppressive tool.

It appears that the majority of unfair terms in adhesion consumer contracts would fall within the scope of the third criterion – disproportion between the interest and damage – because unfair terms are always imposed by professionals to gain an advantage or secure an interest at the expense of the consumer. A contractual term that, for example, exonerates or limits a carrier from liability for bodily injury is certainly abusive and invalid⁴⁴² insofar as the interest the carrier attempts to derive is excessively disproportionate to the damage he causes to the passenger.⁴⁴³

The criterion of disproportionality has been incorporated in comparative legislation as a basis for measuring contractual unfairness. In this regard, two examples can be cited: (i) the French law of 10 January 1978 in its use of the notion of ‘*avantage excessive*’ and (ii) the notion of ‘significant imbalance’ used in Art. 3 of the Directive, which has been transposed into the national laws of most EU Member States.

If the content of unfair terms used in adhesion contracts is analysed, it will become apparent that most of them would lead to the creation of disproportionality between the rights and obligations of the parties. Generally speaking, they can be classified into two large groups. The first group contains terms that have been prohibited and nullified explicitly by law. Terms of this kind are necessarily unfair and can be described as *per se* unfair (commonly referred to in other jurisdictions as ‘black-listed’ terms⁴⁴⁴).

⁴⁴² Such term is invalid under Law No. 68 of 1980 concerning the Commercial Code Art. 191 and under Law No. 28 of 1980 concerning the Maritime Trade Code Art. 207.

⁴⁴³ It is also possible to qualify a term such as abusive either on the grounds of the illegitimate interest criterion because it allows the carrier to escape criminal and civil liability for his faults or on the grounds of the exceptional damage criterion due to the sanctity of the human body which should not be an object in contracts.

⁴⁴⁴ See, for example, articles R. 132-1, 132-2 and 132-2-1 of the French Consumer Code.

Examples of this group are clauses that exclude or limit the liability of the carrier from liability for personal injury in the contract of carriage,⁴⁴⁵ clauses that exclude or limit the liability of the contractor in construction contracts,⁴⁴⁶ clauses that exclude or limit the liability of hotels for deposited items,⁴⁴⁷ and any unfair term in insurance contract which breach had no effect on the occurrence of the insured risk.⁴⁴⁸ In practice the declaration of the invalidity of such terms does not pose any problem for the court because of the explicit statutory prohibition against their inclusion in contracts. The reason behind the Kuwaiti legislator's direct intervention to prohibit such terms, it seems, is because they constitute a stark violation of the principle of public order.

The second group of terms are those that are presumed to be unfair (i.e., potentially unfair or grey-listed terms) but the presumption of unfairness is not absolute and could be rebutted by evidence to the contrary by the professional. An example of this type is if the penalty clause was exaggerated, since the main function of the penalty clause, despite its name, is not to punish the debtor, but to compensate the creditor in case the debtor fails to fulfil his obligation.⁴⁴⁹ One could venture to assume that most unfair terms in the market belong to this group because they give businesses enough room to manoeuvre compared to the first group which are destined to be nullified by the court. Therefore, if an inventory of unfair terms in the KCC were to be created, the task would be much easier with the first group because they have already been disallowed statutorily. Whereas the task in the second group would be much harder since they are not specified and the code does not establish a criterion for their specification.

Although both groups of terms upset the balance of the contract according to the criterion of disproportionality, they differ in two aspects. First, it appears that if the court

⁴⁴⁵ Articles 191 and 207 of the Commercial Code and Commercial Maritime Code respectively cited above.

⁴⁴⁶ Art. 697 KCC. The code provides this 'special protection' to the owner because he usually lacks technical knowledge that contractors possess. The code, therefore, prohibits any in advance exclusion or limitation of liability in construction contracts, p. 508 of the Explanatory Note to the Civil Code.

⁴⁴⁷ Art. 735 KCC.

⁴⁴⁸ Art. 784 KCC.

⁴⁴⁹ Art. 303 KCC.

encounters a term of the first group, it must examine it at its own motion without the request of the consumer because the prohibition relates to public order. Second, the consumer is not required to prove the unfairness of the terms in the first group because of the explicit statutory prohibition, whereas in the second group the burden of proof lies with the consumer who has to show the unfair nature of the term.

3.4 Conclusion

It is obvious that the absence of a clear definition of unfair terms in the KCC contributes, to a large extent, to the proliferation of such terms. It is unfortunate that neither the drafters of the code nor the courts have attempted to clarify their meaning. The position of the courts in particular towards the concept of unfairness is unsatisfactory and inexcusable. Despite the numerous cases involving unfair terms and adhesion contracts, there is not one case in which the courts have taken the initiative to analyse the meaning of unfair terms thoroughly and explain the elements on which they are based.

The protection against contractual unfairness suffers from a further shortcoming relating to the objective scope of application of the rule where the protection is confined to cases where the contract has not been subject to negotiation between the parties. The underlying premise of this approach is the assumption that the adherent party in adhesion contracts requires judicial intervention because he is prevented from discussing the contract terms. Therefore, according to the principle of freedom of contract, the court should not intervene if the terms are the product of a meeting of two minds. However, it has been shown that this assumption is inaccurate and businesses can effectively circumvent them by offering the consumer, who usually lacks legal and technical knowledge, the opportunity to review and amend the terms or engage him in superficial negotiations. Owing to the inherent weaknesses in the position of the consumer, reference

to the absence of negotiation as a requirement for protection against unfair terms should be removed.

In the light of the absence of a lucid meaning of the concept of contractual unfairness, an attempt has been made to bridge this gap with reference to the theory of abuse of rights. It has been proposed that the theory of abuse of rights can be used as a legal basis to explain the meaning and nature of unfair ('abusive', if translated literally) terms not only because of the terminological similarity between the two, but also because they both constitute a deviation from the normative conduct of the reasonable person and produce the same effects. An imposition of an unfair term represents an abusive exercise of the right to contract, and disregards the social function of rights and the institution of contract and the principle of social justice that the Kuwaiti legislator seeks to promote. The four criteria of abuse provided in Art. 30 can be applied to explain and sanction any unfair term. More specifically, the criterion of disproportionality between the derived interest and the inflicted injury, the researcher believes, is a suitable basis for the explanation of the most unfair terms. This corresponds with the modern legislative direction, especially in the EU, which associates the concept of contractual unfairness with the significant imbalance.

However, despite the theoretical suitability of the theory of abuse in controlling unfair terms, there is still an urgent need to introduce new rules for the protection of consumers against unfair terms. The effective application of the abuse theory to unfair terms depends a great deal on the readiness of the courts to apply it. Given the courts' present general attitude and sensitivity towards an expansive interpretation of the rules, the introduction of new rules not only seems desirable, but also imperative.

Chapter Four: Unfair Terms in the Court: Analysis and Assessment of the Courts Role in Unfair Terms Disputes

4.1 Introduction

It was mentioned in the introduction to this study that the proliferation of unfair terms in the Kuwaiti market can partly be ascribed to the deficiency of the judicial mechanism of reviewing unfair terms and the remedies the code provides against them. This chapter will attempt to explain this hypothesis by critically appraising the present approach of judicial review of unfair terms as articulated in Art. 81 of the Kuwaiti Civil Code, and propose an alternative view that provides greater certainty and protection for adhering parties (i.e., consumers) against unfair terms.

In the opinion of the researcher, the deficiency of the present approach of the judicial review of unfair terms appears in three main aspects: (i) the passivity of the court, in the sense that it is not empowered to review unfair terms on its own motion, (ii) judicial intervention to review the terms must be invoked by the adhering party and (iii) the burden of proof of unfairness lies with the weak party, the adhering party.

In applying the principle of judicial neutrality, the code entrusts the court with discretionary power to review the terms without being obliged, however, to respond to the adhering party's request to review unfair terms.

The code, it seems, proceeds from the premise that since the adhesion contract is qualified as an ordinary contract, then the principle of *pacta sunt servanda* must be honoured even when the terms are dictated to the adhering party.⁴⁵⁰ This entails that if the adhering party believes that a certain contractual term is unfair, then it is incumbent on him expressly to request the court to review it and justify his request. As it appears from the

⁴⁵⁰ Art. 196 KCC provides: "Contracts have the force of law between the parties".

wording of Art. 81, the court may not raise the question of unfairness *ex proprio motu* as it has to respect the private autonomy of the parties and refrain from intervening in the contractual relationship. This also entails that the burden to prove the unfair nature of the term lies with the adhering party as the general principles of the civil procedures provide.

However, this premise can be challenged on the same count that the code uses to afford the adhering party with special protection; the contractual weakness argument.⁴⁵¹ The adhering party is a weak party throughout all contractual stages who lacks meaningful means to protect his interests, even after the conclusion of the contract and during judicial proceedings. There is a strong probability that the adhering party weakness prevents him from becoming aware of his legal rights or being able to enforce them. In some disputes the adhering party may be deterred from procuring professional legal representation if the cost exceeds his financial ability. Therefore, there is a real risk that the adhering party, out of weakness, whether it is lack of knowledge or financial ability, fails to challenge the unfair terms pleaded against him.

For these reasons, the approach for judicial review and the remedies for unfair terms as prescribed in the KCC should be reconsidered to provide better protection for consumers and enhance their position vis-à-vis the professional.

The aim of this chapter is to analyse and assess the approach the code has laid down for judicial review of unfair terms and the remedies it offers. Reference will be made to the Directive and the decisions of the ECJ in order to offer a systematic solution to the problem under discussion.

⁴⁵¹ See the discussion in chapter three.

4.2 The role of the court in contractual disputes in general

Before considering the powers the code bestows on the court with respect to unfair terms, it is important to clarify the extent to which the court is permitted to intervene in contractual arrangements in general.

Central to the contract theory in the KCC is the principle of *pacta sunt servanda*. The natural consequence of any agreement is the creation of a legal bond between the contractors in which neither may alter the terms or back out of the bargain by unilateral will. This is affirmed in Art. 196 KCC which prescribes the principle of the obligatory force of the contract: "Contracts have the force of law between the parties. Neither may revoke nor alter its terms unilaterally, except to the extent permitted by the agreement, or as required by law". Equating contracts with laws should be perceived as no more than a rhetorical exaggeration. However, the use of the word 'law' is indicative of the state of sanctity the code attaches to private agreements, thus elevating rights and obligations arising out of a contract to the status of the law.⁴⁵² This is due to the fact that the binding nature of the contract finds its primary source in the parties' autonomy and their common contractual will. This does not mean, however, that party autonomy is the only justification for the binding force of the contract; rather, agreements must be honoured for moral and economic reasons too. On the one hand, once an individual gives his word, he has a moral responsibility to abide by it. On the other hand, agreements are binding because the existence of trust and confidence between individuals is indispensable for the stability of transactions and commercial certainty.⁴⁵³ Thus, in order to establish a secure transactional framework in the market, the sanctity of contract must be upheld.

⁴⁵² Solaiman Murkus, p. 507; Ibrahim Abu Allail, *Contract and Unilateral Will*, p. 273; , *The Explanatory Notes to the Civil Code*, p. 187.

⁴⁵³ In the same vein, see Mohsen Al-Baih, pp. 339–341; Donald Harris and Denis Tallon, *Contract Law Today: Anglo-French Comparisons* (Clarendon Press; Oxford University Press 1989), pp. 385–386.

A corollary of the principle of obligatory force of the contract is the relativity of contracts. A contract may not be altered or revoked except by mutual agreement of both parties. The restriction extends to the court as well. A court, as a general rule, does not have competence to intervene in the contractual relationship by adjusting the contract terms, since the parties' will is sovereign and its intervention would constitute an intrusion on individuals' private autonomy. There are, however, some exceptions to the principle of the obligatory force of the contract in the KCC where the contract may be adjusted or terminated either by the unilateral will of one party⁴⁵⁴ – legislative intervention⁴⁵⁵ – or judicial decision. Because the present discussion is concerned with the judicial revision of contracts, the focus will be on the third exception only.

The court's principal role is to act as an umpire giving effect to the parties' common contractual will that embodied the agreement. It is prohibited from reviewing and modifying the contract terms of its own accord. The underlying assumption in contract law is that the parties have equal bargaining power and they only consent to what reflects their interests.⁴⁵⁶ They are considered the best judges of their own welfare. Thus, it is not for the court to carry out *ex proprio motu* revision of the contract terms simply because it believes they are unfair or unreasonable. However, this prohibition does not extend to cases where the court finds that the contract (wholly or partially) is contrary to an express statutory provision.⁴⁵⁷ Since this is a matter of public policy, the court has a duty to raise the question of illegality and invalidate the contract on its own initiative, at any stage of the

⁴⁵⁴ Such as in employment contracts of indeterminate duration (Art. 44 of Law No. 6/2010 concerning Employment in the Private Sector) and in agency contracts where the principal can dismiss the agent whenever he wishes (Art. 717 KCC).

⁴⁵⁵ The state can issue legislations to regulate the rent prices or the interest rates.

⁴⁵⁶ While this assumption is plausible in negotiated contracts, it is of doubtful validity in adhesion contracts since the adhering party consents to unfair terms against his true contractual will due to his lack of meaningful choice.

⁴⁵⁷ Art. 148 KCC gives the court the power to declare a contract void: "A void contract does not produce any effect. Any person having an interest may invoke its voidness and the court has the power to so decide on its own motion". It should be noted that the void contract does not exist from a strict legal view and the court's decision is of declaratory nature because it merely states what the reality is. The Explanatory Note to the Civil Code explains that in the case of void contracts the court is obliged to declare its voidness on its own motion because its enforcement would contravene with public policy, Explanatory Notes to the Civil Code, p. 173.

proceedings,⁴⁵⁸ and regardless of the position of the parties. Thus, the court has to pronounce a contract void if the contract, for example, lacks an essential condition for its validity, such as the existence of a licit cause for the obligation.⁴⁵⁹ Similarly, the contract as a whole may be valid but contains an illegal term that has been expressly prohibited by the law, such as usurious terms⁴⁶⁰ in loan contracts between individuals (Art. 547) and clauses that exclude or limit the liability of the carrier from liability for personal injury in the contract of carriage.⁴⁶¹ Here, the court may intervene *ex proprio motu* to invalidate the illegal part only without touching the rest of the contract.

In these examples the court has been vested with the power to intervene on its own initiative, even if neither party has raised the question of illegality because the conditions for the validity of contracts, prevention of usury between individuals and the integrity of the human body are intended to protect public interest and, therefore, they constitute public policy.

Other than upholding public policy, there is no legitimate ground for the court to revise the contract terms, no matter how unbalanced the performances of the parties are without express request of the party concerned. The KCC contains several articles that explicitly grant the court the power to intervene to amend or exclude contractual terms in certain situations⁴⁶² but not on its own motion. It appears that the reason for the prohibition of *ex proprio motu* judicial revision of contract terms is that such an exercise represents a restraint on party autonomy and the litigants' private interests, which may only be invoked by the aggrieved party. Furthermore, from a procedural perspective, the court must remain

⁴⁵⁸ Solaiman Murkus, p. 432; the Court of Cassation in Com. Cass. No. 179/99, 7/5/2000 ruled that: "The Court of Cassation is entitled raise on its own motion legal reasons relating to public policy even if not contained in the appeal".

⁴⁵⁹ Art. 176 KCC provides that the contract shall be deemed null if the obligation has an illicit cause. Cause is the reason for contracting and is one of the essential conditions for the formation of a valid contract (with consent and object). Its absence entails the absolute nullity of the contract.

⁴⁶⁰ This includes any kind of interest.

⁴⁶¹ Articles 191 and 207 of the Commercial Code and Commercial Maritime Code cited above.

⁴⁶² Such as if the amount of the penalty clause is manifestly excessive (Art. 303), extend the period for performance if the debtor has in good faith failed to fulfil his obligation (Art. 209.2), if the performance of the contractual obligation becomes excessively onerous burden on a party due to unperceived contingencies that could not have been foreseen at the time of contracting (Art. 198), and in unfair terms (Art. 81).

neutral and impartial to the parties and rule in accordance with the principle *non ultra petita* which determines the scope of the dispute and confines the court's jurisdiction to only those claims that have been submitted to it by the parties.⁴⁶³ As such, the court has to examine the contract terms in accordance with the limits set by the law and as spelt out by the parties in their submissions. This entails that, first, the court may not ignore any request submitted to it by the parties and if it is willing to dismiss a request, it should simply declare so. Secondly, the court may not transcend the bounds of the parties' request by modifying the requests or introducing new requests that have not been raised by the parties.⁴⁶⁴ To go beyond these limits and grant different or higher remedies on its own motion means that the court has exceeded its lawful jurisdiction and its judgment has erred in determining the scope of the dispute.⁴⁶⁵ In such a case it is liable to have its judgment quashed by the Appeal Court or the Court of Cassation on the grounds of being *ultra vires*.⁴⁶⁶

4.3 The role of the court in unfair terms disputes

The general rule applies to adhesion contracts as well and the court will continue to lack judicial competence to revise unfair terms until a request for review has been made by the party who has an interest in the action, that is, the adhering party. However, even with the satisfaction of this condition, the court, as the wording of the text suggests, retains full discretionary power to exercise its jurisdiction over the terms that the adhering party

⁴⁶³ Wajdi Ragheb and Azmi Abudlfattah, *The Principles of the Kuwaiti Civil Proceedings According to the New Civil Procedure Law* (2nd edn, Kuwait, Dar Alkutub 1994) (in Arabic), p. 368.

⁴⁶⁴ Fathi Waly, *Compendium on Civil Procedure Law* (Cairo, Dar Annahdha 1981), p. 524.

⁴⁶⁵ *Ibid*, pp. 522–523.

⁴⁶⁶ Wajdi Ragheb and Azmi Abudlfattah, p. 368; also the principle set by the Court of Cassation in its decision Com. Cass. No. 33/1975, 29/6/1977. It is noteworthy that the judgment is subject to reversal even if it is final and acquired the force of *res judicata*. According to Art. 148(4) of the Civil and Commercial Procedure Code (Law No. 38/1980), the concerned party may file a petition for review if the court awarded something that has not or exceeds what has been requested by the parties in their claims. The Cassation Court has reaffirmed this in several cases; see, for example, Com. Cass. No. 55/96, 26/1/1997; Civ Cass No. 41/94, 20/2/1995.

purports to amount to unfair terms. Since the exercise of the power to review unfair terms is elective, the court may take one of two actions. First, refuse the request to review the alleged unfair terms if it is convinced they are fair on their face. Second, it may find the adhering party's claim to be valid and an assessment of the terms is merited. Naturally, the assessment process involves two processes: (i) qualification of the terms in question to ascertain whether or not they amount to unfair terms and (ii) determination of the appropriate action namely amendment or elimination of the terms.

4.3.1 Qualification of terms

The first step the court would take in the process of revising the qualification of the terms in question would be to ascertain whether or not they amounted to unfairness. As the code makes no reference to the definition of unfair terms or the criteria that can be taken into account in their assessment, this would leave the trial court with broad discretionary power as to what constitutes an unfair term.

Additionally, it is not very clear from the context of Art. 81 whether the qualification of the trial court of a term as being unfair is a matter of law or fact. This question is of considerable importance because it determines whether the Court of Cassation has a supervisory jurisdiction over the inferior courts' findings. Since the Court of Cassation is a court of law that is primarily concerned with the proper application of the law, it does not examine the facts of the case but rather ensures that the judgments of the inferior courts have been rendered in accordance with the law.⁴⁶⁷ Therefore, if the qualification of unfair terms is regarded as a matter of fact, then this means that the Court of Cassation would have no jurisdiction over the decision of the trial court. This would

⁴⁶⁷ Art. (152(2) of the Civil Procedure Code (Law No. 38/1980) provides that appealing the appeal court's judgments before the Court of Cassation is permitted on three grounds: (i) violation of the law, (ii) error in the application of the law and (iii) error in the interpretation of the law. Hence, it is an extraordinary means of appeal whose main aim is guaranteeing the consistent application of the law by the inferior courts, *ibid.*, p. 373.

naturally weaken the position of the adhering party because the parties to the dispute are prevented from raising factual defences before the Court of Cassation.⁴⁶⁸ A survey of the legal literature reveals that there is a division of opinion among legal commentators as to whether the assessment of unfair terms is a matter of fact or law.

Most commentators have opined that this is a matter of fact insofar as the code's deliberate avoidance of providing a precise definition for unfair terms is indicative of the legislator's will to grant the trial court exceptionally broad discretionary power to revise unfair terms.⁴⁶⁹ Furthermore, contractual terms are private arrangements between two parties. They are not rules of law and should not be treated as such. Thus, because the Court of Cassation is a court of law, its competence is confined to determining whether the impugned judgment is in conformity with the law, without reviewing the facts of the dispute. However, some advocates of this opinion argue that for the trial court to avert the supervision of the Court of Cassation, its conclusion must be consistent with the wording of the contract and is in accordance with the principle of justice.⁴⁷⁰

Fewer commentators disagree with the above conclusion and maintain that the qualification of unfair terms is a matter of law.⁴⁷¹ They argue that, while the general rule in contract law is that the interpretation and assessment of contract terms are matters of fact that are at the sole discretion of the trial court,⁴⁷² the issue is different in contracts of 'law-like' nature, such as adhesion contracts and standardized mass contracts.⁴⁷³ These dictated and one-sided contracts, by virtue of the absence of negotiations, create the law that governs the relationship between the parties but, at the same time, takes away from the

⁴⁶⁸ Art. 152 of the Civil Procedure Code.

⁴⁶⁹ To name a few: Abd-Alrazzaq Al-Sanhuri, p. 300; Mohsen Al-Baih, p. 153; Anwar Sultan, p. 68; Murkus, p. 185; Mohammad Bendary, 'Towards a Broader Concept of Consumer Protection in Adhesion Contracts' 1 Jour Sec L, p. 95.

⁴⁷⁰ Abd-Alrazzaq Al-Sanhuri, p. 300.

⁴⁷¹ Abdulfattah Abdulbaqi, p. 188 nt. 1 supported by Bader Al-Yaqoub, *Lesion in the Kuwaiti Civil Code* (Kuwait University 1987) (in Arabic), p. 170 n 1.

⁴⁷² See Art. 193 KCC and its interpretation by the Court of Cassation such as in Com. Cass. No. 308/1996, 22/2/1996; Com. Cass. No. 54/1994, 17/4/1994; Com. Cass. No. 37/1993, 1/2/1993.

⁴⁷³ See Abdulfattah Abdulbaqi and Bader Al-Yaqoub cited above.

offeree his freedom of choice. Thus, such contracts should be treated as legal rules and the revision of their terms should be subjected to the supervision of the Court of Cassation.

Both views have some appeal and each is supported by rational justification. The strength of the first view lies in its reliance on the literal interpretation of the code which generality and broadness imply exceptional power to the trial court that extends further than the mere effectuation of the will of the parties as compared to ordinary contracts. If the court is vested with such wide power, then this entails that it has the sole discretion to qualify, amend or exclude unfair terms, without being subjected to the supervision of the Court of Cassation.

In contrast, the second view takes a more pragmatic approach to analysing the text by comparing adhesion contracts to statutory rules for the purpose of strengthening the adhering party's position vis-à-vis large corporations to subject the findings of the trial court to the highest court in order to ensure the proper application of the law and the attainment of the legislative purposes of protecting the weak party.

It is not easy to decide in favour of either view, especially with the silence of the code on this point, which throws a shadow of doubt on whether the qualification of unfair terms is a matter of fact or law. Even the judgments of the Court of Cassation, unfortunately, do not provide enough guidance. For example, the Court of Cassation has established that the qualification of an entire contract is a matter of law which the trial court exercises under the supervision of the Court of Cassation.⁴⁷⁴ However, it is not clear whether the same principle extends and applies to individual contract terms as well.

In the researcher's opinion, it is not impossible to reconcile these two opinions. In reality, the assessment of disputed terms by the trial court necessarily involves interpretation and application. The court will first need to interpret the disputed terms to discern their actual meaning and then, based on that, it will seek to apply the rule of the law to those terms. The latter activity does not pose any significant problem as the Court of

⁴⁷⁴ Com. Cass. No. 2/93, 25/10/1993.

Cassation in all cases has jurisdiction to consider whether or not the courts below have applied the law correctly. The interpretation activity, however, as it has been established,⁴⁷⁵ is at the sole discretion of the trial court and is exercised without the supervision of the Court of Cassation. Having said that, in order for the trial court to secure its interpretation and escape the supervision of the Court of Cassation, it must lay down acceptable reasons for its judgment and not depart from the apparent meaning of the contract. Therefore, the Court of Cassation may exercise its power to review the qualification of unfair terms by the trial court on the basis of whether it has arrived at its conclusion in accordance with the law and in consistence with the wording of the contract.

4.3.2 Determination of the appropriate remedy for unfair terms

Art. 81 makes it possible to classify the characteristics of the control system of unfair terms as follows: (i) a request for intervention must be made by the adhering party as the court does not have the power to intervene *ex proprio motu*, (ii) the court has full discretionary power to revise the unfair terms, (iii) the court may either amend or eliminate the terms, and (iv) its discretion should be exercised in accordance with the principle of justice. These points will be discussed in turn below.

4.3.2.1 *The nature of the court's power to revise unfair terms: Optional power*

One of the defining features of the Kuwaiti regime for the protection against unfair terms is that the code has vested the court with pure discretionary power to intervene in the adhesion contract. Before the court can intervene and exercise its power to amend or eliminate the unfair terms, a submission must first be made by the adhering party

⁴⁷⁵ See, for example, Com. Cass. No. 25/96, 1/12/1992; see also, Ibrahim Abu Allail, *Contract and Unilateral Will*, p. 262; Abd-Alrazzaq Al-Sanhuri, p. 803. Hence, if the parties describe the contract as a lease contract, whereas it is in fact a contract of sale, then the court may change its description under the supervision of the Court of Cassation.

requesting the court to revise the terms. Yet, the court is not obliged to answer the adhering party's application to revise the terms, even if it concludes that the terms are indeed unfair. This appears from the wording of Art. 81 which reads: "If the contract is concluded by way of adhesion and includes unfair terms, the court *may* [emphasis added] . . . amend the terms to alleviate unfairness or relieve the adhering party from their application".

From the viewpoint of the researcher, the present wording of this article is unsatisfactory because it does not impose an obligation on the court to revise terms, even when it ascertains the existence of the unfair aspect. Making the exercise of the judicial power to revise⁴⁷⁶ the terms discretionary rather than mandatory defeats the very purpose of the establishment of a remedial system against unfair terms. If the legal rationale behind granting the court the power to revise unfair terms is to restore the balance in favour of the weak party, then why make it discretionary? The weakness and vulnerability of the weak party throughout the contract stages and beyond, such as during legal proceedings, justify an intervention from an external power to enforce the law, especially if the party was unaware of his rights or faces difficulties in enforcing them.⁴⁷⁷

Such judicial passivity in disputes involving unfair terms contributes to their proliferation in the market. Against the deficiency of this approach it might be appropriate to seek a solution in another context and learn how other jurisdictions addressed this issue. In the EU, the question of whether national courts are entitled under the Directive to assess the unfair nature of contractual terms on its own motion has been raised in the ECJ. The ECJ first addressed this question in *Océano*.⁴⁷⁸ Its judgment in this case is of considerable importance because the Directive does not elaborate on whether national courts have such power. However, the ECJ ruled that "The protection provided for consumers by the

⁴⁷⁶ By 'revise' is meant the power to amend or eliminate the terms of the contract. The word 'revise' has been chosen to cover both powers.

⁴⁷⁷ This view is consistent with the recent developments in European law where the European Court of Justice decreed that national courts in disputes involving unfair terms not only had a right to assess terms on their own motion, but also an obligation; see the *Océano* and *Cofidis* cases below.

⁴⁷⁸ ECJ Judgment of 27 June 2000, Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero* ECR I-04941.

Directive of 5 April 1993 on unfair terms in consumer contracts entails the national court being able to determine on its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts". The court reasoned that the objective of the protection system would not be achieved if the consumer, out of his ignorance of the law, were himself required to raise the unfair nature of the terms: "The imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract".⁴⁷⁹ Thus, the effective protection of the consumer can be attained only if national courts are able to examine unfair terms of their own accord.⁴⁸⁰ Furthermore, this may act as a deterrent and contribute to the prevention of unfair terms in consumer contracts.⁴⁸¹

In later judgments, such as *Cofidis*⁴⁸² and *Mostaza Claro*,⁴⁸³ the ECJ even went a step further and extended the national courts' competence and declared that they were not only allowed to assess unfair terms *ex officio*, but had the obligation to do so. This dictum was confirmed in *Pannon*.⁴⁸⁴ However, the ECJ specified in this case that such an obligation existed "where it ha[d] available to it the legal and factual elements necessary for that task".⁴⁸⁵ Therefore, the court is required to examine the terms on its own motion only when it has the necessary factual and legal elements available to do so.⁴⁸⁶ Furthermore, the ECJ ruled that where the national court considered a term to be unfair, it must not apply it, except if the consumer opposed the non-application.⁴⁸⁷

⁴⁷⁹ Para 27.

⁴⁸⁰ Para. 26.

⁴⁸¹ Para. 28.

⁴⁸² ECJ judgment of 21 November 2002, C-473/00, *Cofidis v Fredout* [2002] ECR I-10875.

⁴⁸³ ECJ judgment of 26 October 2006, C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421.

⁴⁸⁴ ECJ judgment of 4 June 2009, C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* [2009] ECR I-4713.

⁴⁸⁵ Para 32.

⁴⁸⁶ See also the Opinion of the Advocate General Trstenjak delivered on 6 July 2010 in C-137/08, *VB Pénzügyi Lizing Zrt. v Ferenc Schneider* [2010] ECR I-0000.

⁴⁸⁷ Para 35.

The ECJ's interpretations of the role that national courts have to play in unfair terms disputes represent a significant development in the field of consumer protection. This development provides an opportunity for comparative lawyers to raise fundamental questions as to the role of the courts in civil litigations involving weak parties. In the view of the researcher, it is not sufficient in the context of unfair terms to leave the responsibility of raising the question of assessing such terms to the consumer because of his inferior position. The court should be empowered to play a more active role and raise this question of its own accord to deal with cases justly. To some, this proposition may seem radical because it departs from the traditional role of the courts in the civil process and calls for a more interventionist role in civil cases. Therefore, this shift of attitude may be opposed for reasons of party autonomy and judicial expansion. However, the intervention of the court to control unfair terms can hardly be regarded as an infringement of party autonomy as the court's intervention in this context is to ensure that party autonomy does not transgress its natural limits and violate the rights of other individuals. Likewise, the positive role of the court in contractual relations can also be justified. Contract law, in addition to embracing autonomy values, seeks to promote social values. It is the court's responsibility to ensure that the promotion of such social values is observed. Therefore, if a contract deviates from this goal by imposing unfair terms for pure individualistic reasons, then judicial discretion needs to step in.

4.3.2.2 *Amendment to terms*

The first remedy the court would consider in the course of its revision of unfair terms is their amendment. *Amendment* has been defined as the exclusion of the unfairness aspect while retaining the contract term itself.⁴⁸⁸ This remedy has been said to exceed the normal

⁴⁸⁸ Abduhakam Fodah, *The Interpretation of Contracts in Egyptian and Comparative Law* (Alexandria, Mosh'a'at Al-Ma'aref 1984) (in Arabic), p. 364.

power of the court and represents a serious departure from the prescribed role of the court in contract law.⁴⁸⁹ Such exceptional power has been recognized as being contrary to the principle of *pacta sunt servanda* due to the particularity of the adhesion contract in which one party is left at the mercy of the other.⁴⁹⁰

Although the just sanction for unfair terms appears to be their nullity and elimination from the contract, the code has introduced this remedy because it bases the protection regime on the notion of "removal of the injury" caused by unfair terms.⁴⁹¹ This notion defines the limits of the power of the court. It proceeds from the assumption that if the removal of the injury can be achieved without the elimination of the disputed term, then the term should be preserved by removing the unfairness aspect alone. By introducing the remedy of amendment, the code seeks to strike a balance between the need to promote contractual justice in favour of the adhering party and the stability of contracts in the market. It attempts to correct the contractual injustice arising from the misuse of party autonomy without undermining the institution of contract. This solution stems from a more general and fundamental objective in the code of saving the contract by keeping it alive as far as possible to avoid its dissolution. The court will exercise its power to terminate the contract only as a last resort. The objective of saving the contract extends to individual contract terms and the court will not attempt to eliminate unfair terms unless it is certain that the removal of the unfair part of the term is not feasible. However, not all contractual terms are capable of amendment, either due to their nature, such as if the obligation is indivisible, or when they represent the primary motive for the offeror to enter into the contract and their amendment would render his participation in the contract without a cause.

⁴⁸⁹ Mohsen Al-Baih, p. 154.

⁴⁹⁰ Mohmoud J. Zaki, *A Concise Commentary on the Obligation Theory* (Cairo, Cairo University Press 1976) (in Arabic), p. 292

⁴⁹¹ Abdulfattah Abdulbaqi, p. 187.

The above discussion leads one to raise an important question: What is the extent of the courts' power to amend unfair terms? What does this remedy entail? In fact, there is no one answer to this question, since the nature of the court's exercise of its power to amend the unfair terms varies from one contract to another and according to the unfair term itself. The unfair aspect may relate to a monetary sum the adhering party is requested to pay in case of default, such as a penalty. An example of this sort of terms is liquidated damages and high disciplinary penalties in employment contracts. If the court finds the penalty to be excessive, it may bring it down to a proportionate level to the damage caused.⁴⁹² The unfair term may also relate to a period of time, such as obliging the policy holder in insurance contracts to report the occurrence of the insured risk within a very short space of time, otherwise he would forfeit his right to compensation. In any case, the court may remove the unfair aspect by prolonging this short period to a reasonable period.⁴⁹³

The power to amend the terms, however, does not mean that the court is empowered to rewrite the contract by creating new obligations for the offeror or cause radical changes to the term to the degree of changing its nature. The court has been conferred with such power as an exception to the general rule and its exercise should remain within the defined bounds. Thus, it is only entitled to make necessary changes to an existing obligation, but not add a new one under the excuse of re-balancing the obligations of the parties.

It may be appropriate at this juncture to consider whether the inclusion of the amendment remedy is justified and achieves the desired objective. The ECJ addressed this issue in *Banco Español de Crédito SA v Joaquín Calderón Camino*,⁴⁹⁴ in which it was invited to answer whether the national courts were allowed to modify the content of unfair terms. It ruled that it followed from the wording of Art. 6(1) of the Directive that the

⁴⁹² Ibrahim Abu Allail, *Contract and Unilateral Will*, p. 262; Said Abdussalam, p. 15.

⁴⁹³ The code in Art. 783 has gone as far as declaring forfeiture clauses in insurance contracts null if the policy holder shows that the failure to report the occurrence of the event on time was due to a valid excuse.

⁴⁹⁴ ECJ judgment of 14 June 2012, C-618/10.

national courts were only permitted to exclude the application of unfair terms, without being authorized to modify their content. It reasoned that if the national court were permitted to modify unfair terms, then that would contribute to eliminating the dissuasive effect on businesses.⁴⁹⁵ Additionally, allowing national courts such power would compromise the attainment of the objective of Art. 7(1) of the Directive, which seeks to prevent the continued use of unfair terms in consumer contracts.⁴⁹⁶

The same can be said about the remedy of amendment provided in the Kuwaiti Civil Code. Although it has been introduced to save the contract as concluded between the parties, it is likely, nevertheless, to have adverse effects on the interests of the adhering party. Allowing the court to preserve the term after excluding its unfair aspect would tempt businesses to continue to incorporate them in their contracts because they know that even if they were found unfair, the original term could be amended by the court but nevertheless be preserved. Accordingly, it might be in the best interest of the adhering party to provide elimination as the only remedy against unfair terms.

4.3.2.3 *Elimination of terms*

If the injury caused by the unfair terms cannot be removed by amendment, then the trial court will attempt to eliminate them altogether from the contract. Elimination simply means relieving the adhering party from the application of unfair terms.

The power to eliminate unfair terms has been described by some authors as a "dangerous weapon in the hands of the judge"⁴⁹⁷ because it enables the court to render ineffective a contractual term, contrary to the general rules in contract law that promote and protect party autonomy. Some authors have even attacked the introduction of the *contra proferentem* rule in adhesion contracts, and described it as an unwarranted and

⁴⁹⁵ Para.s 65–69.

⁴⁹⁶ See also the Opinion of the Advocate General Trstenjak delivered on 14 February 2012, paras 86–88.

⁴⁹⁷ Said Abdussalam, p. 15.

unwise step for it grants the courts arbitrary power that might disturb the contractual balance and lead to uncertainty in commercial relations.⁴⁹⁸ This argument, however, has the weakness of presupposing that the adhesion contract is balanced where it is, in fact, unbalanced from the outset and before the intervention of the court. The role of the court is to restore the balance of the contract by alleviating unfairness in the adhesion contract to achieve contractual justice and stabilize transactions in the market. Furthermore, the arbitrary exercise of discretionary power, if it existed, can always be repressed and corrected by the Court of Cassation whose role it is to ensure uniformity of judgments.

The code uses a rather confusing phrase to describe the act of elimination by referring to ‘relieve’ instead of ‘invalidate’ or ‘annul’. This is probably to assert the nature of unfair terms and emphasise the fact that they are not illegal on their face. However, at the same time, the phrase is problematic because it does not really explain the legal effect of unfair terms, especially if one takes into account that the code in other provisions has expressly declared some of them null.⁴⁹⁹ So, why has this phrase been chosen specifically? It seems to the researcher that the drafters, for lack of a better term, sought to use a phrase that is neutral and broad enough to cover the appropriate remedy for terms whether they are *per se* unfair or presumably unfair and have the potential effect of causing serious imbalance in the contract.⁵⁰⁰

Another uncertainty caused by the wording of the text is that it provides no answer to the question of whether the requirement of submitting a request for the revision of unfair terms applies to statutorily prohibited terms as well. If such terms have been statutorily declared null on the basis of their violation of the public policy, should not the court eliminate them on its own motion without application by the adhering party? It is

⁴⁹⁸ Abdulmonem Faraj Assada, pp. 407–408.

⁴⁹⁹ A clear example is Art. 784(b) which provides: "Any of the following terms appearing in a policy of insurance shall be null . . . (b) any unfair term, the breach of which appears to have no effect on the occurrence of the insured risk".

⁵⁰⁰ This is the writer’s personal understanding and it is unfortunate that no studies could be found to back up this opinion. For further details, see the discussion on the taxonomy of contractual terms in the KCC and the legal effect of unfair terms in chapter four.

unfortunate that the code does not provide a clear answer to this question. However, one could say that there are two possible courses of action the court may take. First, it could adhere to the literal meaning of Art. 81 and abstain from assessing the terms on its own motion because it cannot exercise its power without an application by the adhering party. The second possible course is that the court raises the question of nullity of the terms of its own account and eliminates them from the contract on the basis that the code grants it jurisdiction to review absolutely null terms without the need for an application by the adhering party. It is difficult to determine which course of action a court might prefer to follow. However, if one takes into account the narrow interpretive approach to which the courts currently adhere, especially with regard to adhesion contracts, then one should not be too optimistic about their intervention to annul unfair terms on their own motion.

A further point that merits consideration is whether the court is entitled to exercise its power to eliminate the terms before attempting to amend them. There is nothing in the text that suggests that the court is obliged to attempt to amend the terms before eliminating them; rather, the contrary is the case. It appears from the wording of Art. 81 that the court is empowered to eliminate the terms directly as the text uses the conjunction 'or' to indicate a choice between two alternatives.⁵⁰¹ Thus, the court may decide to eliminate unfair terms if it finds it to be fairer and a more equitable remedy than amendment. Moreover, some contractual clauses cannot be amended due to their indivisible nature, which makes their elimination the only possible means to alleviate unfairness.

So, if the court determines that a term is unfair and null, and decides to eliminate it from the contract, what effect would this have on the remainder of the contract? The answer to this question can be found in Art. 190 KCC. It provides that "(i) if part of the contract is null or annulable, then that part alone would be null without the remainder of the contract. (ii) However, if one of the parties shows that he would not have entered into

⁵⁰¹ "The court may amend the terms to alleviate unfairness *or* relieve the adhering party from their application".

the contract without the null or the annulable part, then the entire contract becomes null". Thus, elimination of unfair terms does not entail annulment of the entire contract, unless it appears from the will of the parties that they would not have contracted with each other without the excluded tainted part.

It is worthwhile noting in this context that the court's jurisdiction is restricted to the exclusion of the unfair term only and does not extend to the annulment of the entire contract under the pretext of protecting the adhering party. The code confers the power to revise the contract as an exception to the general rules, and exceptions should be interpreted restrictively. However, if it appears to the court that the excluded term constitutes an essential part of the bargain in the sense that the contract cannot continue to exist without it, then it may annul the whole contract.⁵⁰²

4.3.3 Guarantees the code provides for the proper application of the protection system

In order to ensure effective application of the protection system, the code contains two important rules that aim at preventing the offeror from evading the protection afforded the adhering party.

First, the code extends protection regardless of whether or not the adhering party was aware of the unfair terms. This means that the protection applies even if the offeror brought those terms to the direct attention of the adhering party. Therefore, the latter's knowledge or ignorance of the terms is irrelevant for the application of protection. His awareness of the inclusion of the unfair terms does not alter the fact that he still lacks meaningful choice.⁵⁰³ It is hard to envisage the existence of such a choice, hence, genuine consent, in contracts between grossly unequal parties if there has not been real negotiation.

⁵⁰² Cf. Mohammad Bendary, pp. 98–99.

⁵⁰³ Hassan Gemei, *The Effect of Inequality between Contractors on the Contract Terms*, p. 243.

The extension of protection of the terms the adhering party was aware of represents a significant improvement in the protection system against unfair terms which used to, until the second half of the twentieth century, equate knowledge to consent and restricted the protection to terms that the adhering party did not know or could not have known about.⁵⁰⁴ Moreover, it has an advantage from a procedural perspective. It relieves the parties from the burden of proving knowledge or implied acceptance, and spares the courts' time by allowing them to concentrate on the substance of the dispute.⁵⁰⁵

Although the simple meaning of the word *awareness* denotes knowledge or realization, its actual meaning, in the researcher's opinion and as implied by the text, should not be confined to this limited sense. Rather, it should be interpreted broadly to include even those terms to which the adhering party has expressly consented. It is not uncommon in practice for the offeror to demand that the consumer signs on each page of the contract document to indicate that he has read and understood its content thoroughly for the purpose of evidencing that he had choice. Thus, the inclusion of this rule provides an extra layer of protection against abusive exercises of the strong party.⁵⁰⁶ It is laudable that the drafters have included this important rule to prevent any possible dispute on the question of whether the protection applies to unfair terms of which the adhering party was aware. Confining the protection to only the terms that the adhering party knew about would allow the rules to be easily circumvented by professionals, consequently, emasculating the purpose of the protection offered.

The second guarantee the code provides for the proper application of the protection system is the mandatory nature of the court's power. The rules that vest in the

⁵⁰⁴ For an overview of this development, see Abdulmonem Faraj Assada, p. 285 *et seq.*; Atef Abdulhamid Hasan, pp. 113–114.

⁵⁰⁵ The courts sought to broaden the protection in favour of the adhering party by introducing the notion of 'sufficient knowledge' as a requirement for the admittance of unfair terms. The offeror was, therefore, required to make the unfair terms visible in order to be enforceable, Abdulmonem Faraj Assada, pp. 288–290.

⁵⁰⁶ It has been argued by some that the adhering party should not be qualified for protection if the unfair terms were hand-written while the rest of the contract was typed, seemingly because he had the freedom not to contract, and in addition this would provide more stability to transactions. However, this argument has been rejected and did not find support, Atef Abdulhamid Hasan, p. 113.

court the jurisdiction to revise unfair terms are of mandatory character and cannot be ousted by agreement because they are of public policy. Every agreement to the contrary of this rule is void. If such an agreement were to have legal effect, it would subject the application of the law to the will of the parties. Consequently, it would render the protection conferred on the adhering party inoperative because it allows professionals to include such term in every adhesion contract.⁵⁰⁷

4.3.4 Effect of unfair terms on the entire contract

If the court were to find that a certain clause was indeed unfair and decided to exclude it from the contract, what effect would this have on the remainder of the contract? In order to answer this question, the court's power to revise unfair terms must first be qualified and an attempt must be made to find a basis for it in the Civil Code.

Abu Allail⁵⁰⁸ has argued that the court's power to revise unfair terms whether by elimination or amendment is a direct application of the notion of 'reduction' (i.e., partial nullity) as regulated in Art. 190 KCC. Art. 190 provides: "(i) If part of the contract is void or voidable then the effect shall be limited to that part alone without the remainder of the contract. (ii) However, if one of the parties proves that he would not have entered into the contract without the affected part then the entire contract becomes void". Apparently, the principal rationale for including this provision in the code is to conserve the contract and increase the certainty of transactions by limiting the effect of nullity to the invalid parts, instead of extending it to the whole transaction.

⁵⁰⁷ Abd-Alrazzaq Al-Sanhuri, p. 300.

⁵⁰⁸ Ibrahim Abu Allail, 'The Scope and Conditions for the Reduction of Juridical Acts' (n 307) p. 82. Frequent referral will be made to this study throughout this section because it is the only study that has thoroughly discussed the notion of reduction in the KCC and in comparative law.

Reduction has been defined as a judicial means of correcting a partly defective contract by excluding the defective part to avoid the nullity of the entire contract;⁵⁰⁹ in other words, it is a mechanism that seeks to limit the effects of a null part of a contract by preventing it from being extended to the valid remainder whenever possible. Therefore, reduction can be seen as a consequence of partial nullity; they are not synonyms. This is because partial nullity is a legal state, while reduction is a judicial act that seeks to correct a partially null contract.⁵¹⁰

In order for the court to exercise its power to reduce the contract, it must satisfy requirements. The first requirement is the partial nullity of the contract. This is when certain parts or individual clauses of the contract become void or voidable. Such as when a contract involves two transactions but one of them is void, or when it includes a null clause. Nullity, however, as some scholars have argued,⁵¹¹ should be given a broad meaning to cover any defect that infects the contract. Therefore, the application of reduction to adhesion contracts cannot be challenged on the grounds that the theory only applies to void or voidable contracts, but rather the theory is sufficiently broad to be applied to any partially defective contract even if not void or voidable.

Secondly, the contract must be divisible in the sense that the valid remainder of the contract is capable of continuing to exist independently from the invalid part and remain in full force to produce legal effects; in other words, the divisibility must be possible from a technical perspective. This is an axiomatic requirement as the exclusion of the defective part can only be made if the contract can be separated into defective and valid parts.⁵¹² Thus, before the court amends or excludes the defective part, it will first have to

⁵⁰⁹ Ibrahim Abu Allail, 'The Legal Meaning of Reducing Juridical Acts' (1987) 11(3) *JouroL* 61, p. 115.

⁵¹⁰ In support of this view, see *ibid.*, p. 119.

⁵¹¹ Ibrahim Abu Allail, 'The Scope and Conditions for the Reduction of Juridical Acts' (n 307), p. 83.

⁵¹² *Ibid.*, p. 90. Abu Allail pointed out that one of the characteristics of the notion of reduction is that it does not alter the legal nature of the contract and its effect is limited to the elimination of the invalid part without affecting the essence of the transaction, p. 355. This is in contrast to the notion of conversion of void contract which allows the replacement of a void contract by a different and valid contract if elements of a valid contract can be derived from the void contract, (Art. 191 of the Kuwaiti Civil Code). Needless to say, the

assess whether the contract can be divided and that the remaining part of the contract is capable of taking a life of its own, independently of the defective part.

This is only conceivable, and this is the third requirement, if the defective part is not the determining factor in the contract. If it appears to the court that this part was the inducement to enter into the contract, even for the sake of one party only,⁵¹³ then the reduction cannot be achieved, which would lead to the collapse of the contract as a whole.⁵¹⁴ This means that the criterion for reduction is primarily subjective and is determined on the basis of the intention of the parties. Therefore, the contract will continue to exist after the exclusion of the unfair terms, unless one of the parties (naturally the professional in adhesion consumer contracts) proves that he would not have concluded the contract without such terms. It is incumbent on the party who seeks avoidance of the contract to show that the defective part was the determining factor in the conclusion of the contract.⁵¹⁵ However, the submission of such defence should be made in accordance with the principle of good faith⁵¹⁶ and should not be used by the professional as a bridge to escape the fulfilment of his obligations. The trial court has full discretionary power to accept or refuse the professional's application without being subject to the supervision of the Court of Cassation because such defence is a matter of fact.

court cannot proceed to reduce or convert the contract against the will of the contracting parties. As a general rule, their acceptance is central to the practice of both mechanisms.

⁵¹³ Ibid., p. 115.

⁵¹⁴ , *The Explanatory Notes to the Civil Code* explain that the entire contract in this case becomes invalid due to the invalidity of the cause of the contract. In the view of the drafters, if the invalid part is the determining factor of contracting, then it is actually the main cause of contracting which illegality or absence renders the contract null, p. 179. Abu Allail, however, disagrees with this generalisation and argues that while the two ideas coincide and overlap in meaning, the absolute equation between the notion of cause and the notion of the determining factor is not completely accurate; see Ibrahim Abu Allail, 'The Scope and Conditions for the Reduction of Juridical Acts' (n. 307), pp. 113–115 of his article cited above. In his view, while both notions derive from the will and intention of the parties, the determining factor of contracting may not always be the cause of the contract. While the cause is an essential requirement for the formation of the contract and is relevant to its validity, the determining factor can in some cases be more or less than a physiological element that induced the party to enter into the contract. In such cases it is less important than the cause of the contract. A simple example would be a consumer who opts to purchase a car for his personal use (this would be the cause) from a particular car dealer because the dealer offers a more flexible payment scheme (flexibility of payment being the determining factor).

⁵¹⁵ Art. 190(2) KCC. See also, Com. Cass. No. 190/1993, 8/3/1994 and, Ibrahim Abu Allail, p. 118.

⁵¹⁶ Ibid.

The above does not mean that the criterion for the reduction of the contract is always subjective as the court may in certain cases impose the reduction against the parties' intention and even if the invalid part was the determining factor in contracting. This is when the application of reduction is required by an express statutory provision.⁵¹⁷ A good example is Art. 547 KCC pertaining to Contracts of Loan. This article declares void any contractual stipulation that provides an interest in a contract of loan between individuals, but without prejudice to the contract itself which will continue to exist and bind the parties. In this example the code expressly invalidates usurious clauses but, at the same time, asserts that the invalidity shall have no effect on the remainder of the contract. Thus, as the text suggests, if such a clause is brought before the court then it would confine the invalidity ruling to the clause alone without extending the invalidity to the entire contract, even if usury was the determining factor in contracting for the lender. Here, the will of the legislator replaces the will of the parties, and the intention or the will of the lender is insignificant inasmuch as the interest the code seeks to protect the interest of the borrower, is greater than the interest pursued by the lender who seeks invalidation of the contract due to the invalidity of his usurious clause.⁵¹⁸

Can the notion of reduction (or partial nullity) be regarded as the theoretical and statutory basis of the court's exercise of its discretionary power with regard to unfair terms? In the opinion of the researcher the answer is yes, but requires an explanation.

A careful reading of articles 175.2 and 190.1⁵¹⁹ KCC reveals that the general rule is that the invalidity of a certain part of the contract does not entail the invalidity of the entire contract, unless it is expressly stated otherwise in the code. So, against the silence of

⁵¹⁷ Abu Allail has dubbed this type of reduction 'obligatory reduction'; *ibid*, p. 122 .

⁵¹⁸ It is worthwhile mentioning that the code considers a loan between individuals as an act of benevolence and a means of alleviating the hardship of the needy. The charging of money lent to others conflicts with the spirit of sympathy and co-operation that should prevail in society. The prohibition of usurious loans in the Civil Code finds its basis in the Holy Qur'an chapter 2 verse 275: "Allah has permitted trade and forbidden usury". See also, *The Explanatory Notes to the Civil Code*, p. 408.

⁵¹⁹ Art. 175(2) provides that if the contract contains an unlawful stipulation, then the stipulation alone shall be void and the contract shall remain valid. However, if one of the parties shows that he would have not consented to the contract without such stipulation, in this case the entire contract shall be void. Similarly, Art. 109(1) establishes a similar rule and confines the scope invalidity to the tainted part of the contract only.

article 81 KCC on the effect of the invalidity of unfair terms on the rest of the contract it seems to the researcher that the general rule applies and the invalidity of unfair terms does not import the nullity of the entire contract. The judicial pronouncement of an unfair term as null should have no effect on the remainder of the contract, even if the unfair term was a determining factor in the offeror's conclusion of the contract. Thus, if the court finds that the contract is severable, then it would naturally invalidate the unfair terms alone without extending the invalidity to the rest of the contract. This interpretation is not only consistent with the apparent meaning of articles 175.2 and 190.1 KCC, but also benefits the adhering party and strengthens his position vis-à-vis the offeror. It prevents and sanctions the offeror who in bad faith seeks to invalidate the entire contract on the grounds of the notion of determining factor if the court decides to invalidate the unfair terms he inserted into the contract. This conclusion may be readily accepted with regard to statutorily prohibited unfair terms (i.e., blacklisted terms)⁵²⁰ because they are void in all circumstances and the court must, as it appears from the wording of the article, invalidate them of its own motion on the grounds of being statutorily proscribed.⁵²¹ However, does the notion of reduction apply to potentially unfair terms too despite the fact that they are not invalid on their face? The researcher is inclined to adopt the view advanced by some scholars that the broadness of the notion of reduction allows its application to any defective juridical act, even if the defect does not amount to being void or voidable.⁵²² Although Art. 175(1) provides that the parties are generally free to determine the content of their agreement and include any term they desire, this freedom is not absolute and the code explicitly prohibits the inclusion of contractual terms that breach the law or are contrary to public policy or good morals.⁵²³ Therefore, the general rule is the lawfulness of the contractual terms. However, some terms have the potential to be unfair and their unfairness aspect does not appear at the time of the

⁵²⁰ Such as clauses that exclude or limit the liability of the carrier from liability for personal injury in the contract of carriage; for further examples, see the previous chapter.

⁵²¹ See the discussion in chapter three on the taxonomy of contract terms in general and types of unfair terms.

⁵²² Ibrahim Abu Allail, 'The Scope and Conditions for the Reduction of Juridical Acts' (n 307), p. 13 *et seq.*

⁵²³ Art. 175(1) KCC.

formation of the contract, but rather upon their execution.⁵²⁴ While such terms are generally permissible, the manner in which they are executed turn them into unfair terms that upset the equilibrium of the contract and violate the spirit of the contract for the detriment they cause to the interests of the other contractor. Such contractual practice breaches the notion of social justice the KCC seeks to promote and the proliferation of unfair terms in the market is certainly against the public policy.

Accordingly, it seems that the court's exercise of its discretion to revise unfair terms is a direct application of the notion of reduction whether the exercise is in relation to elimination by exclusion or attenuation by amending them to alleviate the unfairness aspect.

4.3.5 The burden of proving unfairness

Although the KCC is silent as to who bears the burden of proving the unfair character of a clause, the common rule in evidence law is that the burden of proof rests on the party who makes a claim in his interest that affects the other party, whether this is the plaintiff or the defendant (*actori incumbit probatio*).⁵²⁵ Thus, this general rule implies that the burden of proof lies with the party who claims that the term is indeed unfair, that is, the adhering party. It is his duty under the risk of losing the dispute to establish facts that support his claim and characterize them in legal terms. However, in the light of the absence of a statutory definition of unfairness on which the adhering party can rely, his chance of persuading the court of his claim seems slim.

The basis for the allocation of the burden of proof in civil and commercial disputes is provided in Art. 1 of the law of evidence⁵²⁶ that "the creditor has to prove the existence of the obligation and the debtor has to prove that he is free from the obligation".

⁵²⁴ See chapter three.

⁵²⁵ Fathi Waly, p. 572; Abdulrasol Abudredha and Jamal Al-Nakkas, p. 360.

⁵²⁶ Law No. 39/1980 on the issuance of the Evidence Law in Civil and Commercial Matters.

This article establishes a very important principle in evidence that the burden of proving the legal incident is on the claimant. The claimant does not necessarily mean the party who initiates the proceedings, but any party who disputes to the contrary of an existing situation.⁵²⁷ The rationale behind placing the burden of proof on the claimant, as the Court of Cassation puts it, is that individuals are presumed to be free from liability and whoever argues the contrary has to prove his allegation.⁵²⁸ If the claimant succeeds in his allegation and establishes the liability of the respondent, then the burden of proof shifts to the latter.

The allocation of the burden of proof on the claimant is justifiable in disputes between equal parties. However, there are instances where the contract manifests gross inequality between the parties due to the superiority of the party that prepares the contract. This is especially right in the case of adhesion contracts. The presumed equality does not exist in such contracts due to the inherent weakness of the adhering party throughout the contract stages and beyond. It is unlikely that an average adhering party will be able to show the unfairness of the term as in legal proceedings as this normally requires legal and factual knowledge, which most consumers do not possess. Additionally, the length of the legal proceedings and the high cost of legal representation discourage consumers from seeking legal assistance, especially if the dispute involves a small claim. Therefore, placing the burden of proving the unfairness of the terms on the adhering party who lacks sufficient legal and technical knowledge seems unduly burdensome and renders the protection system largely ineffective.

In order to make the protection system more efficient in eliminating unfair terms, it would be appropriate to revisit the burden of proof rule and attempt to remedy the weak position of the adhering party. One way of achieving this is by reversing the burden of proof by introducing a threshold test of unfairness and categorizing unfair terms into two lists. The first is a black list that comprises terms that are considered unfair and void in all

⁵²⁷ Explanatory Notes to the Law of Evidence.

⁵²⁸ Com. Cass. No. 69/1992, 6/12/1992.

circumstances, and the second is a grey list that includes terms that are potentially unfair depending on the circumstances. If the disputed term corresponds to a term on the black list, then this would create an irrefutable presumption that the term is unfair because the prohibition of such terms is a matter of public policy. In contrast, if the term corresponds to a term on the grey list, then this does not mean that the term is necessarily unfair, but rather is presumed to be unfair and the burden of proving its fairness shall be incumbent on the offeror who has to show the fairness of the term if he wishes to rely on it.

However, this does not mean that if a term does not fall within either list that it is automatically fair, since it is impossible to draft a comprehensive list that includes every unfair term in the market. Rather, if the unlisted term is suspected of being unfair and has the effect of creating a significant imbalance between the rights and obligations of the parties, then it should be examined in the light of the general unfairness test. In all cases, if the offeror inserts an onerous term into the contract, he shall bear the burden of proving its fairness.

The rationale behind reversing the burden of proof is that the offeror in adhesion contract is normally a business that possesses greater resources and has better access to information than its consumers, and when an unfair term is inserted into the contract, then the business should justify why such a term was included. It must be borne in mind that unfair terms represent a departure from the normal rules in contract law as they alter the rights and obligations of the adhering party in favour of the business. If the offeror wishes to rely on an unfair term, then it is for him to justify the deviation from the normal rules, especially when one takes into the account his refusal to discuss his terms before the formation of the contract.

The reversal of the burden of proof seems a just and practical solution for both parties. It would also contribute to the stability of transactions in the market as it enhances legal certainty and contractual predictability in so far as it obliges the offeror who prepares the terms unilaterally to reconsider the insertion of unfair terms or risk their elimination

from the contract. However, this could only be achieved if a general test of unfairness is established, backed up by black and grey lists of unfair terms.

4.3.6 Restrictions on the court's exercise of its power to revise unfair terms

The code provides in Art. 81 that the court shall exercise its discretionary power to revise unfair terms in accordance with the principle of justice. Apparently, this criterion has been incorporated into the text to serve a dual purpose. First, as a signpost to guide the court in deciding the appropriate action to be taken against an unfair term and, secondly, as a restriction on the court's exercise of its power. Therefore, the court must reach a just result and provide grounds for its decision, otherwise it would be susceptible to reversal on appeal.

One of the advantages of this criterion is that it gives the court ample room to correct contractual unfairness and reach equitable results, whether by elimination or attenuation by virtue of its flexibility and elasticity. Some have described this criterion as an ethical principle aimed at creating equality between individuals ultimately to establish balance in the legal relationship.⁵²⁹ Thus, it is perceived as the only influence on the court's decision to achieve fairness.⁵³⁰

However, as with other open-ended norms, the flexibility and broadness of the principle of justice may give rise to conflicting interpretations by the courts due to its obscurity and lack of definitive meaning.⁵³¹ In addition, its application might prove problematic as the understanding of what is just differs from one individual judge to another and from time to time.⁵³² Therefore, what is needed instead of such an open-ended norm that may give rise to arbitrary results is a more specific formula that the court should

⁵²⁹ Abduhakam Fodah, p. 363.

⁵³⁰ Ibid. The principle of justice resonates in several articles in the code, especially in the context of rebalancing the obligations of the parties; see articles 50, 51, 160, 195, 306.

⁵³¹ Ibid, 363; Said Abdussalam, p. 17.

⁵³² Ibid.

take into account when assessing a term to mitigate the effect of any possible uncertainty about the meaning of unfairness.

A look at the matter from a comparative perspective reveals that the modern trend is the inclusion of complementary criteria that the court should take into consideration besides the general test of unfairness in the process of assessing an unfair term. In this regard, the Directive provides a more logical and practical approach. It combines an abstract assessment that focuses on the substantive content of a term⁵³³ with a procedural assessment that takes into account the way in which the contract was concluded. In the procedural assessment Art. 4 of the Directive identifies supplementary criteria that the courts should take into account in the assessment process. These criteria are: (i) the *nature* of the goods or services for which the contract was concluded, (ii) the *circumstances* attending the conclusion of the contract, and (iii) the *interdependence* of the term in question to other terms of the contract or of another related contract.

4.4 Conclusion

The analysis carried out above shows that the prescribed role of the Kuwaiti court in unfair terms disputes needs to be reconsidered in several aspects. Although the code entrusts the court with wide discretionary power to revise unfair terms, whether by elimination or attenuation, the lack of *ex proprio motu* control of unfair terms renders the protection system ineffective to a great extent. The adhering party as an inferior party may not be able to defend his rights during the proceedings; therefore, the imposition of a duty on the court to examine unfair terms on its own motion would compensate for the imbalance in the relationship between the adhering party and the professional. The enhancement of the weak position of the adhering party also requires shifting the burden of proving the fairness

⁵³³ Art. 3 of the Directive provides: "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

of the term to the professional. If he wishes to rely on a term he inserted in the contract, then it should be incumbent on him to prove the fairness of the term. The effective operation of the control system requires revisiting the remedies provided against unfair terms, too, and allow for the elimination of the unfair terms as the only remedy for the inclusion of unfair terms. If the law acknowledges judicial modification of the terms, then this would encourage professionals to insert unfair terms, knowing that the court will only remove the unfair aspect but not the terms all together. Furthermore, this would diminish the preventative role of the rules. Lastly, the code should introduce supplementary factors to assist the court in the process of its assessment of unfair terms instead of the excessively broad principle of justice that does not have any specific meaning.

Chapter Five: Clearing Up the Market: A Proposal for the Establishment of Positive Enforcement Procedures

5.1 Introduction

One of the major drawbacks of the present regulatory system of unfair terms in the Kuwaiti law is that it is a private litigation-based control system because it solely relies on private enforcement; in other words, the adhering party will not be able to avail himself of protection unless he resorts to the court and requests the revision of the allegedly unfair term(s). The scarcity of court decisions on adhesion contracts and the absence of any case in which unfair terms have been eliminated raise serious doubts as to whether private enforcement is a real solution to the problem and indicates that the courts alone are unable to provide efficient protection against unfair terms. This is naturally due to the reactive nature of private enforcement and the relativity of the *res judicata* in courts' judgments under the Kuwaiti law of civil procedure. This suggests that a simultaneous means of redress should be established to provide effective protection for consumers. Therefore, it is perhaps necessary to introduce a public law preventative mechanism that actively seeks to rid the market of unfair terms prior to their imposition on consumers without the need to resort to private enforcement by entrusting the task of clearing the market to an administrative body that regulates unfair terms in advance.

The aim of this chapter is to consider whether an administrative control mechanism of unfair terms should be established in Kuwait. Although public law enforcement is not the within the researcher's area of speciality, an attempt will, nonetheless, be made to propose a general framework for an administrative model for the advance regulation and enforcement of unfair terms in the Kuwaiti market. The discussion will involve a look into the administrative regulation of unfair terms from a comparative

perspective to understand the regulatory approach in other jurisdictions and determine whether their adopted solutions can be implemented in the Kuwaiti context.

5.2 Rationale for seeking a parallel enforcement mechanism

For any protection system to be sound and effective, it not only requires the existence of well-conceived and strong substantive rules, but also an effective enforcement mechanism that can achieve a high level of compliance and respect for these rules. The enforcement mechanism as provided by the Kuwaiti law depends on individual litigation in which the adhering party must initiate a legal action against the offeror in order to challenge the unfairness of the terms.

Basing the enforcement mechanism on individual litigation alone is insufficient and contributes to the failure of the protection system as a whole. The reasons for this are manifold and can be classified into two broad categories.

The first category relates to the attitude of the adhering party himself and comprises reasons ranging from financial factors and psychological barriers to lack of sufficient legal knowledge.⁵³⁴ First of all, the cost of litigation and legal representation may serve to deter adhering parties from taking legal action against unfair terms. An ordinary individual may rationally decide not to initiate legal action against a large corporation on the grounds of unfairness for fear of losing or if the potential gains from bringing the dispute before the court are not significantly higher than the incurred costs. Ordinary individuals are unlike businesses and other well-funded organisations that usually have deep pockets to afford court litigation and face the financial risks involved. Secondly, naturally most individuals are not accustomed to lengthy commercial disputes that might stretch over a lengthy period. Indeed, a trial can turn out to be quite a mentally stressful

⁵³⁴ Stefan Wrba, Steven Van Uytsel and Mathias M. Siems, *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge, Cambridge University Press 2012), p. 32; Ewoud Hondius, 'Unfair Contract Terms - New Control Systems' 26 *AmJCompL* 525, pp. 525–549; p. 528 n. 25.

experience for an individual due to the considerable amount of time and effort he needs to invest in court proceedings. Therefore, the fear of judicial proceedings is likely to make consumers psychologically less inclined to take legal action, especially against sophisticated businesses.⁵³⁵ Thirdly, an ordinary consumer would find it very difficult to argue for the unfairness of the term because of his insufficient knowledge of the substantive and procedural aspects of the law.

The second category of reasons concerns the shortcomings associated with the institution of enforcement of the law on individual litigation alone, mainly because in practice such a mechanism has a limited effect and does not fulfil a preventative function. Rather, it leads to uncertain results, inadequate remedies and does not guarantee the uniformity of courts' decisions.

Since the professional typically has a much larger interest in the unfair term he inserts in the standard contract than the interest of the consumer, he will attempt to preserve the currency of the unfair terms and minimize his losses by convincing the consumer to settle the dispute out of court so that the judgment would not set a precedent. However, even if the matter reaches the court, it is as a matter of procedural law⁵³⁶ that a court's decision pronouncing a term to be unfair creates a *res judicata* effect whose binding force is strictly limited to the parties to the case (*inter partes*) and to the particular dispute it determines. It does not prevent the same business from relying on the same clause in other standard contracts and even less that other businesses will cease using them in their standard contracts. Equally, the *res judicata* of the court's decision enjoining the elimination of an unfair clause applies to the actual wording of the disputed term but not to the legal effects it produces.⁵³⁷ A resourceful professional can always rephrase the same

⁵³⁵ Hondius ascribes the dislike of individuals to traditional courts to, *inter alia*, psychological causes such as "austere court buildings and antiquated rules of procedure", Ewoud Hondius, 'Unfair Contract Terms - New Control Systems' p. 528.

⁵³⁶ According to Art. (53) of Law 39/1980 concerning Evidence in Civil and Commercial Matters, a court decision acquires *res judicata* to the dispute it resolves and its effect binds the parties to the dispute only.

⁵³⁷ The European Commission has described the *res judicata* problem as a deficiency in the private enforcement mechanism which frustrates the proper implementation of the Directive in some Member States:

clause or simply replace it with another harsh clause to circumvent the court's decision, which means that the consumer needs to challenge the clause again in order to eliminate it.

For these reasons, the individual litigation mechanism for the enforcement of unfair terms is bound to fail to free the market of unfair terms. It has been argued by some that in the field of consumer protection regulation repeated lawsuits against inventive wrongdoers is an expensive and frustrating course: "One does not cure any serious breakdown in a theoretically competitive market system by case-to-case sniping, but one does not do much harm either".⁵³⁸ Indeed, consumer transactions in the modern marketplace are characterized by the prevalence of standardized contracts as a contracting paradigm where a large volume of agreements is concluded but each of which is relatively small in value. Only a handful of disputes would reach the courtroom and even if the court eliminates the unfair terms, a single and isolated case would not deter a professional and others like him from further breaches.⁵³⁹

The above argument shows that effective consumer protection against unfair terms should be aimed at restricting the contents of the standard contract by a mandatory authority. Power can only be checked by another power. Therefore, what seems to be needed is the intervention from an external power that is able to remedy the significant imbalance caused by the professional's abuse of power in favour of the consumer.⁵⁴⁰ A public enforcement mechanism offers many advantages. Unlike individual litigation,

"There is a contradiction between the goal of the legislation on unfair terms and the result of its enforcement . . . the rules designed to protect consumers do not achieve their stated goal", *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts COM (2000) 248 final*, pp. 22–23.

⁵³⁸ Arthur A. Leff, 'Unconscionability and the Crowd-Consumers and the Common Law Tradition' 31 *UPittLRev* 349, pp. 356–357; see also Larry Bates, 'Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection' 16 *Emory Int'l LRev* 1, p. 105.

⁵³⁹ David Slawson, 'Mass Contracts: Lawful Fraud in California' 48 *S Calif L Rev* 1, p. 47. Bergh and Visscher also argue that private actions cannot achieve an adequate level of enforcement in consumer law due to what he calls the 'free-rider' problem where every victim prefers other victims to sue the professional so that they incur the cost and risk of the action, Roger Van den Bergh and Louis Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' 1 *ELER* 5, p. 16.

⁵⁴⁰ In *Océano Grupo (C-240/98)* the ECJ at para 27 commented: "The system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract". The ECJ suggested that this positive action could come from a public arm of the government or *ex officio* intervention by the court.

public enforcement does not require individual initiative but rather the public body may initiate a legal action of its own accord whenever it believes that a certain term threatens the interests of consumers. A public body would naturally be equipped with qualified staff and adequate resources than an individual consumer would have at his disposal, which would enable it to see the broader picture, and assess the economic and social implications of a term. Besides that, public enforcement contributes to the promotion of uniformity of rules and guarantees legal certainty, since the results are considerably predictable.⁵⁴¹ An action brought by the public body would have an *erga omnes* effect that benefits all consumers concerned as opposed to the *inter partes* effect produced in individual litigation. As precedents build up, professionals will be forced to take heed and scrutinize their standard contracts before offering them to the public.

In the EU context the drawbacks posed by individual litigation have been offset by the Directive. By virtue of Art. 7, Member States are required to introduce adequate and effective means to prevent the continued use of unfair terms, including giving public authorities and organisations that represent consumers' interests the right to take action on behalf of consumers.

In the researcher's view the ideal solution to the present deficient procedural enforcement of unfair terms under the Kuwaiti law is the introduction of public enforcement mechanism whereby an independent public body is authorized to monitor the market and actively seeks to prohibit the continued use of unfair terms. Additionally, if lessons are to be drawn from the European experience, it is evident that it is necessary to give consumer organisations standing to represent consumers and initiate proceedings on their behalf against unfair standard terms.

The discussion that follows will attempt to address this point by proposing an alternative enforcement mechanism and will attempt to delineate the features of a public

⁵⁴¹ This, of course, depends on the existence of a clear concept of contractual unfairness that consists of a definition of *unfairness* and the provision of lists that contain unfair and potentially unfair terms.

enforcement model. However, before proceeding to the discussion it is beneficial to shed some light on the benefits of public enforcement and explore the different regulatory models that are implemented in other jurisdictions.

5.3 Three levels of control

The phenomenon of unfair contract terms is by no means restricted to a certain jurisdiction, but rather is a universal problem. Several countries, especially in Europe, have enacted legislation against the use of unfair terms and introduced mechanisms for their control.⁵⁴² Comparative research reveals that a diversity of enforcement mechanisms to counter unfair terms exists within Europe and each mechanism has its own distinctive characteristics that reflect the objectives the national legislator pursues within the philosophy of the legal system.⁵⁴³ Even with the enactment of the Directive, which has been primarily enacted to harmonize and approximate the member states' national fairness rules in consumer contracts, there are still significant institutional and substantive differences between the existing enforcement mechanisms across Europe. This variety of experiences provides the comparative lawyer with a rich source of information that can be relied upon when researching how law reform should be implemented effectively. It seems, therefore, that the study of the various existing enforcement models in Europe could offer a useful perspective to approach an enforcement model for Kuwait.⁵⁴⁴ However, the reader should be reminded that the discussion will not delve into the differences between these mechanisms, but merely attempt to distill from them the essential ingredients for an effective enforcement mechanism.

⁵⁴² Martin Ebers, pp. 197–260.

⁵⁴³ Ibid.

⁵⁴⁴ Many writers view comparative law as an instrument for the development and promotion of law reform; to name a few: W. J. Kamba, 'Comparative Law: A Theoretical Framework' 23 ICLQ 485.; Peter De Cruz, chapter one.

As has been noted by Calais-Auloy⁵⁴⁵ the existing enforcement mechanisms can generally be categorized into three distinct groups depending on the time when the control mechanism is implemented: (i) remedial mechanism (i.e., after the conclusion of the contract), (ii) preventative mechanism (i.e., between the drafting and conclusion of the contract), and (iii) ultra-preventative mechanism (i.e., during the drafting of the contract and prior to its conclusion).

In the remedial control mechanism a legal action either by the consumer himself or a group of consumers (through group action) against the professional for an already concluded contract is required in order to eliminate the term. The elimination of the unfair terms can be vested in an ordinary or specialist court that has competence to review the dispute and determine whether or not the term is fair. Accordingly, all European member states are obliged by virtue of Art. 6(1) of the Directive to recognize this mechanism and deem unfair terms at least not to be binding on the consumer.⁵⁴⁶ The drafters of the Directive adopted the notion of non-bindingness as a neutral way of expressing the remedy of unfair terms⁵⁴⁷ due to the diversity of legal traditions. Consequently, the requirement of non-bindingness has been transposed to the Member States in different ways, such as non-existence, nullity, voidability and enforceability, according to the legal order of each state.⁵⁴⁸

Clearly, the remedial mechanism is not designed to fulfil a preventative function because its effect is limited to the parties to the dispute and is mainly aimed at excluding the unfair term from the scope of a particular contract only.

⁵⁴⁵ M. J. Calais-Auloy, 'Clearing of the Market: The Mechanism for Controlling Unfair Terms (Article 7)' (The Directive on 'Unfair Terms', Five Years Later- Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999); p. 173–182.

⁵⁴⁶ Art. 6(1) provides: "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms".

⁵⁴⁷ Joseph Chitty and Hugh Beale, p. 1203.

⁵⁴⁸ , *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts COM (2000) 248 final*, p. 19.

However, the preventative mechanism, in turn, pursues a more radical objective beyond the mere nullification and exclusion of unfair terms of the contract. Rather, it focuses on the elimination of unfair terms of all existing contracts in the market.⁵⁴⁹ Therefore, it seeks to create a collective effect that extends beyond the parties of the contract to protect all prospective consumers. The Directive takes the prevention to an even higher level by requiring Member States to ensure that adequate and effective measures exist "to prevent the continued use of unfair terms" whether they are used or not.⁵⁵⁰ In *Commission v Italian Republic*⁵⁵¹ the ECJ explained that the meaning of the phrase "*continued use*" should not be restricted to the prevention of terms that are already actually being used, but also future terms that have been drawn up for general use but have not yet been put into use, such as recommended terms by a trade association.⁵⁵²

The ultra-preventative control mechanism is the most stringent mechanism of the three because the unfair terms are prohibited before the standard contract is proposed to consumers. Its main aim is to ensure that the contract does not contain terms that are prejudicial to the consumer or confer on the professional an unfair advantage that is likely to prejudice the consumer. The control can be exercised in one of two ways. The first is for the professional to submit the standard contract to a public agency or tribunal that is vested with the power to approve or reject the standard contract prior to its offering to consumers. If the proposed contract is rejected, then the professional may not be able to use it.

In the second way, the contract is drafted by means of informal bilateral negotiations between professionals (or a professional association) and an organisation that represents the interests of the consumer, such as a consumer association⁵⁵³ or an

⁵⁴⁹ M. J. Calais-Auloy, p. 174.

⁵⁵⁰ Art. 7(1).

⁵⁵¹ Case C-372/99, 24 January 2002.

⁵⁵² The ECJ commented at para 15 that the measures could have deterrent and dissuasive impact only if "actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts, but have only been recommended by suppliers and sellers or their associations".

⁵⁵³ This technique has been implemented in the Netherlands where negotiations are held between the Committee for Consumer Affairs (Commissie voor Consumentenaangelegenheden) and professional associations under the auspices of the Social and Economic Council to draft standard contracts, for more

ombudsman.⁵⁵⁴ The basic advantage of this way is that the consumer organisation can negotiate unfair terms out of the standard contract and ensure from the outset that the terms are balanced and fair.

Some commentators have suggested that the application of prior approval as a regulatory instrument across the market on all consumer contracts is almost impossible because it requires vast resources that are well beyond the government's means, such as an adequate budget and a large number of qualified personnel.⁵⁵⁵ This view was also stressed by the European Economic and Social Committee in its opinion on the proposed Directive. The committee was less receptive to the idea of subjecting every standard contract to prior control as it would be "extremely bureaucratic" and does not guarantee the disappearance of unfair terms.⁵⁵⁶ However, despite the disadvantages of this mechanism, its application in specific sectors where the protection is mostly needed is by all means necessary, such as in banking and insurance contracts.⁵⁵⁷

So, which model of the three is relevant to the Kuwaiti case? The researcher believes that all three should be recognized but in varying degrees. In order to provide an adequate level of protection for consumers against unfair terms, a sound regulatory system should be created that consists of both substantive and procedural rules that allow control

information; see <http://www.ser.nl/en>. This technique resulted in fully-fledged standard contracts in certain sectors like gas, electricity and water; see Ewoud Hondius, 'The Legal Control of Unfair Terms in Consumer Contracts: Some Comparative Observations', p. 55.

⁵⁵⁴ In the Nordic countries the Consumer Ombudsman plays a central role in supervising consumer contracts, see Thomas Wilhelmsson, 'Administrative Procedures for the Control of Marketing Practices- Theoretical Rationale and Perspectives' 15 JCP 159.

⁵⁵⁵ Sinai Deutch, 'Control of Unfair Terms in Consumer Contracts in Israel: Law and Practice' 13 JCP 181, p. 196.

⁵⁵⁶ *Opinion of the Economic and Social Committee on the "Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts"*, 2001/C 116/25 at para 8.2.1. From a business perspective, prior approval has been regarded by insurance companies as a major problem of the insurance business because the process of approval is time-consuming, Spencer L. Kimball and Werner Pfennigstorf, 'Administrative Control of the Terms of Insurance Contracts: A Comparative Study' 40 IndLJ 143, p. 228.

⁵⁵⁷ , *Opinion of the Economic and Social Committee on the "Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts"*, 2001/C 116/25 , para 8.2.1; Colin Scott, Julia Black and Ross Cranston, *Cranston's Consumers and the Law* (Butterworths 2000), p. 102; Sinai Deutch, p. 196. It should be noted, however, that pre-vetting on standard contracts by public bodies in certain sectors is often required for considerations other than consumer protection, such as solvency of the insurer.

prior to the drafting of the contract, before it is offered to consumers and after it has been concluded.

The current control system in Kuwait is essentially of a remedial judicial nature where the prohibition of the terms comes at a later stage, after the contract has been concluded through individual litigation. Earlier in this chapter it was explained why reliance on individual litigation alone as a mechanism for controlling unfair terms is bound to fail.⁵⁵⁸ Furthermore, it has emerged rather clearly from the previous chapter that the weaknesses of the judicial control procedure of unfair terms in Kuwait lies in the fact that it requires the weaker party to raise the unfairness question by himself and does not empower the court to examine unfair terms *ex proprio motu*. However, even if the courts are granted the power to examine unfair terms *ex proprio motu*, it is not enough as this would only allow individual consumer protection, but does not ensure collective prevention. In view of this, the search for a more effective control mechanism becomes a necessary task.

Therefore, what seems to be missing is a pre-emptive control mechanism that is able to address the drawbacks associated with the individual litigation-based mechanism. This can be achieved by introducing two additional layers of control. The first layer is the requirement of obtaining prior approval for standard contracts in specific sectors, such as banking and insurance, from a public body before the contract can be proposed to consumers. The second layer is granting a public body the powers, *inter alia*, to monitor the market and seek the prohibition of the use of unfair terms by means of injunctions, as well as acknowledging consumer organisations' right to represent consumers in courts, and before competent authorities and courts. Therefore, how a preventative mechanism can be implemented in Kuwait will be discussed in the following pages. However, owing to the limitations of the study, the first layer will not be considered as the main objective of this chapter is to propose general solutions that are able to govern the control of unfair terms

⁵⁵⁸ See section 6.2 above.

across the market and are not confined to a specific sector. The following discussion will focus on the second layer only and an attempt will be made to delineate its main features.

5.4 A perspective on an effective control model in Kuwait

5.4.1 Basis and scope of control

In designing a control mechanism it is necessary to identify precisely what is to be controlled. It is only after this question has been answered that an appropriate mechanism can be proposed; in other words, any enforcement mechanism should be based on a clear conceptualisation of the problem to be controlled. An important question then becomes: What is the problem that a public enforcement mechanism in Kuwait should seek to control?

It has been shown in the previous chapters that the present regulatory approach in Kuwait is largely based on classical contract theory where the problem of unfair contract terms is perceived as a problem that concerns one party only; the adhering party. The Civil Code, despite admitting that such terms are a byproduct of an exceptional contracting paradigm that affects a multitude of individuals, does not recognize any measures that are aimed at protecting the collective interests of adhering parties. Rather, the remedies that the code makes available, namely content revision and *contra proferentem*, are constructed to balance the interests of an individual party against the interests of the professional.⁵⁵⁹

The researcher is of the opinion that basing the control on classical contract theory alone is both wrong and ineffectual. For the control mechanism to be effective, the problem of unfair terms should be viewed in a wider context that has socio-economic

⁵⁵⁹ It seems that the act of adhesion to a contract is perceived by the draftsmen of the KCC as a consent issue arising from the absence of negotiation, hence the protection rules should aim to ensure consent which would eventually result in fairness. Although this preliminary conclusion cannot be supported by reference to other studies, the very regulation of the contract of adhesion in the Civil Code under the heading of consent is indicative of classic contract theory thinking expressed in the aphorism '*qui dit contractuel, dit juste*' (if it is contractual, it is fair).

implications on a large number of individuals, and that the interests of the professional should be balanced not against the interests of an individual consumer, but rather against the collective interests of consumers.

Another similarly important point that merits consideration in putting forward a proposal for an enforcement mechanism against unfair terms is the determination of the scope of control. Should public control be extended to all unfair terms or limited to specific types of terms? In chapter three of this thesis, it was pointed out that the vagueness of the meaning of unfair terms is a fundamental problem in the KCC and there is an urgent need to introduce a clear concept for unfair terms. The concept should consist of a general criterion of unfairness supplemented by two lists: black containing *per se* unfair terms and grey containing potentially unfair terms. It has also been proposed that the legislative protection should not apply to negotiated terms provided that the consumer was given a real opportunity to influence the terms.

In view of this, the scope of control should be limited to standardized non-individually negotiated terms only. This means that the control should be directed to pre-formulated terms that have been drawn up for a large number of contracts which the professional imposes on adhering parties without negotiation.⁵⁶⁰ The main objective of the public control of unfair terms should focus on the protection of the collective interests of consumers; therefore, the public body should not be overburdened with responsibility to resolve individual cases. However, this is not to say that the protection against unfair terms should not be applied to individual cases, but simply the aggrieved party in such cases should himself initiate the court proceedings. Additionally, public control should not be concerned with individually negotiated terms, even if they were pre-formulated for an indefinite number of individuals, provided that the consumer accepted them freely and after he had been given a genuine opportunity to change them.⁵⁶¹ Lastly, the control should

⁵⁶⁰ This is also the chosen scope in the UK by the UTCCR; see Regulation 12(1).

⁵⁶¹ See chapter three.

be concerned with business-to-consumer adhesion contracts only; business-to-business standard form contracts should not be covered in the ambit of control. The problem of inequality of bargaining position and the weakness of the adhering party is not manifested in contracts between commercial parties. Businesses are, generally, in a position that enables them to appreciate the implications of the standard terms and do not usually need the kind of protection consumers need in consumer adhesion contracts.⁵⁶²

5.4.2 General features of a public control design

Having identified the basis and scope of the control mechanism, it now becomes necessary to outline the main characteristics of the structure that should be established to realise this control. It would be beneficial to the discussion to look into the comparative experience of other countries where best practices have been developed and attempt to derive workable solutions for an effective means to control unfair terms.

5.4.2.1 *Who should bring challenges against the general use of unfair terms?*

In order for the control mechanism to yield the best results in practice, this role should be assigned to an entity that has the resources necessary to monitor the market and enforce the law. It is submitted that in order for a public control mechanism to yield the best results in practice, it should consist of two-level control.⁵⁶³ At the first level, consumers' interests are represented by a consumer organisation or a public body (or both) that engages in

⁵⁶² There are different reactions in Europe to the question of whether the protection against unfair terms should be extended to businesses. In France, on the one hand, Art. e L132-1 of the Consumer Code does not restrict notion of consumer, hence protection, to natural persons but also include legal persons (or non-professionals) such as businesses that conclude contracts that are not directly related with their profession. In the UK, on the other hand, there have been suggestions to extend the scope of protection to small businesses as well; see Law Commissions (joint report), *Unfair Terms in Contracts*, (Law Com No. 292 Cm 6464, Scot Law Com No. 199, 2005).

⁵⁶³ E. H. Hondius, *Unfair Terms in Consumer Contracts*, p. 224; Mario Tenreiro, 'Conclusion' (The Directive on 'Unfair Terms', Five Years Later- Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999), p. 217.

negotiations with professionals for the removal of unfair terms from their standard contracts. At the second level, a court or a board is empowered to issue injunctions against the use of unfair terms.

When one looks at the European scene, one finds that the task of enforcing unfair terms is entrusted to different bodies. Article 7 of the Directive requires member states to adopt:

" adequate and effective means . . . to prevent the continued use of unfair terms and such means should include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair"

It is up to the Member States to decide on which means should be put in place.

In most member states this task has been undertaken by an administrative body established for consumer protection purpose.⁵⁶⁴ The UK model in particular has been highly successful as evidenced by the UK Office of Fair Trading (OFT) bulletins.⁵⁶⁵ The OFT is the chief enforcement authority of the UTCCR.⁵⁶⁶ Regulations 10–15 give the OFT a wide range of powers that allow it to carry out its responsibility. This includes a duty to consider any complaints made to it against any unfair term drawn up for general use⁵⁶⁷ apply for injunctions against existing or recommended unfair terms drawn up for general

⁵⁶⁴ Martin Ebers, p. 252.

⁵⁶⁵ The OFT unfair contract terms bulletins are available at <http://www.of.gov.uk>; see also Christian Twigg-Flesner, 'The Implementation of the Unfair Contract Terms Directive in the United Kingdom', p. 258.

⁵⁶⁶ The UTCCR extend the enforcement powers to other public and private qualifying bodies listed in Schedule (1) to the regulations.

⁵⁶⁷ Regulation 10. This is unless the complaint appears to be frivolous or vexatious or a qualifying body has notified the OFT that it agrees to consider the complaint, Regulation 10(a) and (b).

use to prevent their continued use,⁵⁶⁸ power to obtain documents and information,⁵⁶⁹ and the publication of the details of any undertaking given to it or to a court and allow it to arrange for the dissemination of information and advice concerning the operation of the UTCCR.⁵⁷⁰

However, the experience in other Member States shows that assigning the responsibility of enforcing unfair terms to a private organisation representing the collective interests of consumers could produce equally effective results. In Germany, for example, consumer protection organisations are entitled to bring injunction proceedings against the use of unfair terms on behalf of consumers.⁵⁷¹

Which approach of the two approaches is likely to be more effective in Kuwait? It seems to the researcher that the application of the first model in Kuwait is preferable through the establishment of an independent public consumer protection authority that has direct enforcement powers. This is because the second model presupposes the existence of active private consumer organisations that are able to effectively bear and carry out such heavy responsibility. It is unfortunate that no such organisation yet exists in Kuwait. Furthermore, a public body would have more authority than private organisations to coerce businesses to abide by the law. However, this does not imply that private organisations should not have a role in enforcing unfair terms in the future. On the contrary, they could play a complementary role and contribute to ensuring an adequate enforcement level as public enforcement cannot take legal action against every infringement in the market.

In the meantime, the role of the public body should be clearly envisaged and it should be equipped with powers that enable it to achieve its objectives. This discussion will not consider the institutional structure of the public body, but rather will focus on the main issues that the public body has to tackle.

⁵⁶⁸ Regulation 12(1).

⁵⁶⁹ Regulation 13.

⁵⁷⁰ Regulation 15.

⁵⁷¹ Hans-W Micklitz, 'Report on the Practical Implementation of Directive 93/13/EEC in the Federal Republic of Germany' (The Directive on 'Unfair Terms', Five Years Later- Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999), p. 221.

5.4.2.2 Powers that should be given to the public body

In order for the public body to carry out its responsibilities effectively, the researcher suggests that it should be granted some powers. These powers should include the power to consider complaints, conduct investigations and negotiate fair contracts with professionals, and standing to initiate legal action.

This researcher is of the opinion that a free public redress mechanism should be made available to those with a complaint. Identifying a public defender that will take action on behalf of consumers without cost would encourage public confidence in the system. Therefore, the duty to consider complaints about unfair terms that have been drafted for general use should be recognized as one of the basic responsibilities of the public body. If the public body finds the complaint to be well founded, then it should launch an investigation to determine whether or not the terms are unfair. To facilitate the investigation, the public body should be given the power to require the professional to submit to it any document or any other relevant information that the body needs to deal with the complaint. If the public body believes that the terms in question are unfair, then it should be entitled to negotiate with the professional within a reasonable amount of time for their withdrawal from the standard contract before initiating formal legal actions. If the professional accepts the withdrawal of the unfair terms from the standard contract, then he must give an undertaking in writing that the unfair terms in question would no longer be used in existing and future contracts. If the professional refuses to provide such an undertaking, then the public body should be given the power to initiate court proceedings against the professional.

However, the above should not mean that the public body cannot carry out its investigatory powers on its own initiative. On the contrary, it should constantly monitor the market by examining businesses' standard contracts for any potential unfair terms and not wait until injury occurs.

The experience, especially in the UK, suggests that the use of complaints and negotiations proved to be very effective extra-judicial instruments for the elimination of unfair terms. The statistics of the OFT show that despite the fact that the office had to deal with a large volume of complaints about unfair terms in consumer contracts, it nevertheless succeeded in resolving the complaints entirely without the need to commence court proceedings.⁵⁷² The office has even adopted an active approach in dealing with complaints; not only does it consider the particular term complained about, but also investigates all the terms of the contract. The OFT outlines its approach as follows:

"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".⁵⁷³

The OFT effort does not stop at taking preventative action against an individual professional, but often investigates the standard terms across all sectors of the industry so that the terms used by similar professionals can be examined together. For example, in 1997 the OFT approached seven mobile phone companies regarding the length of the termination notice, following the negotiations all approached companies agreed with the OFT requests to revise their terms and reduced the notice period to a maximum of one month.⁵⁷⁴ Similar success in other sectors has also been reported.⁵⁷⁵ This practice, apart from being an effective instrument for consumer protection, can also contribute to fair

⁵⁷² *Unfair Contract Terms Bulletin, The Office of Fair Trading, Issue No 4 December 1997*, p. 5. The work of the OFT is published regularly in bulletins that record its efforts. These bulletins are available at the OFT's website <http://www.of.gov.uk>.

⁵⁷³ *Ibid.*, pp. 14–15.

⁵⁷⁴ John Vickers, 'Contracts and European Consumer Law: An OFT Perspective' in Stefan Vogenauer and Stephen Weatherill (eds), *Harmonisation of European contract law: Implications for European Private Laws, Business and Legal Practice* (Hart 2006), p. 175.

⁵⁷⁵ Susan Bright, 'Winning the Battle Against Unfair Contract Terms' 20 LS 331, 20(3), 334.

competition between businesses operating in the same line of trade as no business will have a competitive advantage over another through the use of the eliminated term.

The primary regulatory mechanism the OFT relies on is negotiation as an alternative dispute resolution mechanism. If the OFT believes that a contract term is unfair, then it will try to persuade the professional to amend or exclude the term under the threat of taking legal action. Negotiating-out terms with professionals has achieved similar success in Sweden and the Netherlands, and a significant decrease in the number of court decisions in disputes involving unfair terms has been recorded.⁵⁷⁶ However, negotiations did not have a similar positive impact in other countries such as France.⁵⁷⁷ This is probably largely due to the fact that the model in France is essentially non-compulsory and the *Commission des Clauses Abusives* does not possess any enforcement powers but merely the issuance of non-binding recommendations on unfair terms. Hondius argued that in order to get professionals around the negotiation table, a ‘stick-and-carrot’ approach must be devised.⁵⁷⁸ The stick is provided by a court that may order the professional to cease the use of the unfair terms. The enforcement body may not need to resort to the court but the threat that it will use it is sufficient to induce the professional to co-operate and revise the terms. Indeed, it is argued that this course of action has been so productive because of professionals’ fear of bad publicity. Also, agreeing on fair terms with the enforcement body would allow professionals to secure the protection needed for their standard contracts instead of making the unfair terms vulnerable to nullity by the court. Most importantly, settling the dispute by way of negotiation is by far less costly for the business than going to court.⁵⁷⁹

⁵⁷⁶ , *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts COM (2000) 248 final*, p. 25.

⁵⁷⁷ Ruth Sefton-Green, ‘A Comparison of the Institutional Implications of the Directive on Unfair Terms in Consumer Contracts in France and the UK’ in Jacobien Rutgers (ed), *European contract law and the welfare state* (Europa Law Publishing 2012), p. 124.

⁵⁷⁸ E. H. Hondius, ‘Unfair Terms in Consumer Contracts: Towards a European Directive’ *EuropConsumer LJ* 180, p. 183.

⁵⁷⁹ Susan Bright, p. 335.

In the light of this, the public body in Kuwait should be given the power to initiate legal action against professionals who refuse to amend their terms. As a representative of consumers' interests it should be allowed to issue warnings against offending professionals for the removal of unfair terms from their standard contracts and standing to bring court proceedings in case of non-compliance. The warnings entail that the enforcement body writing a letter to the offending professional ordering him to stop using the unfair terms. If the professional disputes the warning, then the enforcement body can initiate court proceedings against him, requesting the removal of the terms. The typical judicial remedy would be the nullification and elimination of the unfair terms from the standard contract. However, it might be appropriate to consider the introduction of more deterrent remedies against continuing offenders, such as financial penalties and publication of the judgment in daily newspapers at the expense of the professional.

Apart from the enforcement role, the public body should attempt to establish information transparency by assisting businesses in understanding the law and raise public awareness of consumers' rights. This could be done through the regular publication of guidance notices outlining the law and the procedure for challenging unfair terms, as well as recommendations on terms that it considers to be unfair. The OFT in particular has been very active in this field and its website contains a myriad of leaflets, reports, and consultations for businesses and consumers on unfair terms in addition to routine bulletins that give details of cases where the OFT has secured amendments in contract terms.⁵⁸⁰ Some countries, such as Poland and Spain, have created a register of unfair contract terms which includes all terms that have been pronounced unfair in court judgments.⁵⁸¹ Similar information transparency and register should be developed in Kuwait so that businesses and consumers can know whether or not the terms conform to the law.

⁵⁸⁰ <http://www.of.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/#.UoQqVXBUHNp>

⁵⁸¹ , *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts COM (2000) 248 final*, p. 23. Poland have made the register publicly available online at <http://www.oukik.gov.pl>.

The last point in this chapter that merits short discussion concerns the role that consumer organisations should have in the enforcement procedure. Any law reform in the consumer protection field should consider granting consumer organisations the right to initiate legal action on behalf of consumers who suffered similar harm and intervene in court proceedings initiated by the public body in their collective interest. While it has been argued above that the public body should be the main player in the enforcement mechanism, this role should not be concentrated in the hands of the public body alone as it naturally will not be able to take action against every standardized unfair term. The participation of consumer organisations in the enforcement procedure seems necessary and may well contribute to the prevention of the use of unfair terms. This is especially true in lawsuits where a multitude of consumers are affected by the same unfair term and provides a means for redress to individual consumers who are unable to start court proceedings.

5.5 Conclusion

The proposed enforcement model contemplates the creation of a novel independent public body that represents the interests of consumers and is equipped with powers that allow it to enforce the law effectively. Among the powers are the power to consider complaints, launch investigations on its own motion, introduce negotiation as an alternative dispute mechanism and the right to bring court proceedings against professionals to order the removal of unfair terms. It is also recommended that any law reform effort should envisage the introduction of criminal sanctions, such as fines, against continued infringements and in more serious cases. Rendering the unfair terms null or ineffective might not be enough in some cases.

For some this proposal might seem radical for it introduces a public law-based solution to a private law problem, which could be said to represent an incursion of public law into private law. However, the above discussion suggests that the problem of unfair

terms is not a problem of traditional contract law and its implications go far beyond an individual consumer. The classical remedies provided by the KCC through individual litigation only do not suffice to remedy the situation and guarantee the prevention of unfair terms in the market. What is needed therefore is an active approach towards a preventative control model enforced by a governmental arm. Whether the proposed enforcement model will have a preventative effect will obviously depend a great deal on the commitment and determination of the enforcement authority.

Conclusion

This thesis has attempted to identify the key problems associated with the Kuwaiti protection regime against unfair terms and sought to propose solutions for its overhaul. It started from the hypothesis that the protection model as prescribed in articles 80 and 81 KCC has failed considerably in providing the weaker party in adhesion contracts with an adequate level of protection against unfair terms. The discussion throughout the chapters sought to confirm this hypothesis and uncover the various aspects of the problem. The analysis has shown that the problem of the Kuwaiti control model of unfair terms can be reduced to three basic issues: (i) narrow scope of protection, (ii) absence of a standard of contractual unfairness and (iii) ineffective enforcement procedure.

In the researcher's view, the failure of the Kuwaiti protection model of unfair contract terms has five main aspects:

- i. The design of the protection model does not take into account the weakness of the adhering party and his need for protection prior to the formation of the contract. The law allows intervention only after the conclusion of a binding contract.
- ii. The judicial restrictive interpretation of the concept of adhesion contracts has considerably limited the scope of protection to cover few contracts only.
- iii. The code does not provide a definition or standard of unfair terms, thus leaving the notion obscure and surrounded with ambiguity.
- iv. The enforcement procedure relies solely on the weaker party and does not require, or at least allow, the court to raise unfairness issues on its own motion.
- v. The protection model lacks a preventative framework for addressing unfair terms that prevents their continued use at a market level.

These issues have been discussed in five chapters:

Chapter one explored whether, in the light of the statutory deficiency and since the phenomenon of unfair terms is a pure contract law problem, these issues can be tackled through recourse to the general principles of contract law. It was shown, in two sections, that it is possible, at least theoretically, to control unfair terms by using the general principles of contract law, such as the theory of defects of consent and the principle of good faith. It has been argued that since unfair terms are imposed on the weaker party against his contractual will, then it is reasonable to suspect that his consent to the unfair terms was not obtained in an appropriate manner. If this assumption is right, then the problem of unfair terms appears to be a consent-related problem and their validity can be challenged on several grounds. First, given the fact that modern standard contracts are often drafted in a complex and sophisticated legal, and sometimes technical, language, many individuals may fail to understand the meaning of the contract terms or appreciate their implications. In this case it can be argued that the validity of unfair terms can be contested on the grounds of error. Similarly, unfair terms can be challenged on the grounds of fraud. It is not uncommon that professionals misrepresent the terms of the contract, either by hiding some important facts or burying the terms in small print so that the consumer fails to notice them. Lastly, the rules on exploitation may be applicable. The professional, by virtue of his superior bargaining position, may exploit the inherent weaknesses of the consumer and induce him into entering a contract that contains unfair terms.

The argument that the theory of defects of consent may play a role in countering unfair terms seems valid and uses a plausible premise. However, this role will always be limited as the effect of its application would necessarily bring the contractual relationship to an end rather than restore the upset balance of the contract. Furthermore, given the rigid and inflexible attitude of the Kuwaiti courts towards a progressive interpretation of the

rules, it is doubtful whether the courts would show the desire to accept the application of the theory of defects of consent to control unfair terms in practice.

In section two of this chapter an attempt was made to ascertain whether the principle of good faith could be used to control unfair terms. It was shown that the KCC establishes a relationship between good faith and contractual fairness in the sense that unfair terms cannot be imposed without violating the duty of good faith. It was also pointed out that other jurisdictions, such as Germany, and Portugal, have been very successful in controlling unfair terms in standard contracts on the grounds of good faith. However, as for Kuwait, the analysis concluded that it was doubtful, at least for the time being, whether that application of the principle of good faith on unfair terms would produce similar effects, mainly because it remained an underdeveloped criterion that could not be used autonomously to control contract content. Therefore, the failure of the general principles of contract law in controlling unfair terms shows that an immediate legislative intervention is required to address the deficiency of the rules.

Chapter two reviewed the scope of protection against unfair terms and focused on adhesion contracts as the protection was recognized in their context. Therefore, the chapter was divided into three sections dedicated to discussion of the historical development of the adhesion contract, its regulation in the KCC and its interpretation by the Kuwaiti courts.

The purpose of the historical review was to analyse the evolution of the concept of the adhesion contract and the impact it had on contract law. This was a necessary step to help understand the reason for the Kuwaiti courts' preference of a narrow interpretive approach of the concept of adhesion contracts and to set a perspective for the criticism of such approach.

As for the regulation of the adhesion contract, it was made clear that the main objective for its regulation in the Kuwaiti code was to acknowledge its contractual nature and to confirm that absence of negotiations does not preclude the formation of a binding

contract. However, the analysis revealed that while it was essential to stress the contractual nature of such contracts, the regulation had failed to take into consideration the weakness of the adhering party and his need for the protection of his consent prior to the formation of the contract. Likewise, the analysis has also found that the traditional concept of adhesion contracts still dominates the legal thinking of the courts. The courts prefer the adoption of a narrow interpretation of adhesion contracts by linking it to the notions of monopoly and essentiality of the object of the contract. This view was deserted long ago in many jurisdictions, especially in the Western world in which adhesion contracts have evolved. Consequently, the position of the Kuwaiti courts not only seems outdated, but is also unfounded and inconsistent with the wording of the KCC itself which requires absence of negotiations and the advance formulation of the terms as the only two features. This finding shows that the problem of the scope of protection is not with the wording of the law, but rather with the judicial preference of a traditional definition over a modern one.

Chapter three concentrated on the notion of contractual unfairness in the KCC and attempted to clarify areas of ambiguity surrounding it. The discussion investigated two problems associated with the wording of the law: (i) the vagueness of the notion of unfairness and (ii) the objective scope of protection. First, the KCC was criticized for not including a definition or standard to determine what might qualify a contractual term as being unfair. Although such omission was not unintentional in order to give the court some flexibility when interpreting unfair terms, case law has shown that the courts have never attempted to clarify its connotation. This has resulted in legal uncertainty and constituted a flagrant disregard of the spirit of the law. The interpretation of such a complex technical term should not be left to the courts alone, especially if they have shown a proclivity to adopt narrow interpretations. The second problem associated with the notion of unfairness is related to the objective scope of protection. The law bases the protection against unfair terms in adhesion contracts on the pre-formulation of the terms by the offeror and the inability of the adhering party to negotiate the terms of the contract. However, it is not too

difficult for businesses to circumvent these two requirements by using a model contract prepared by a third party, such as another business or a trade association, or by engaging in superficial negotiations with the adhering party. This research suggested the need for the reconsideration of the existing objective scope of protection against unfair terms by, first, removing reference to pre-formulation of terms by the offeror and, secondly, substituting the requirement of negotiation with the notion of inability to influence the terms.

In the light of the ambiguity of the notion of contractual unfairness, the chapter sought to determine its meaning in the context of the KCC. It was emphasized that the absence of a statutory definition of unfairness did not necessarily mean that its meaning could not be discerned. Therefore, the analysis demonstrated that the meaning of contractual unfairness could be ascertained with reference to the theory of abuse of rights as articulated in Art. 30 KCC. Because the end result of unfair terms is the creation of a significant imbalance between the parties, it was suggested that the test of disproportionality, above the other tests of abuse, was the most suitable to determine when a certain contractual term was unfair. However, although the discussion showed that the abuse theory could be used to determine and control unfair terms, legislative intervention remained necessary to provide legal certainty and predictability.

Any future reform of the law should add clarity to the concept of unfairness to assist the court in assessing the fairness of the terms. This can be achieved by: (i) introducing a general test of unfairness based on the notion of flagrant disproportion between the interest the professional gains and the harm the unfair terms cause to the consumer, and (ii) providing two lists of unfair terms; one containing terms that are automatically ineffective, and the other containing terms that are presumed to be unfair.

Chapter four assessed the judicial procedure for enforcing the protection rules against unfair terms. Having studied and reviewed Art. 81 KCC, it is clear that the law is also deficient in this area. Despite the fact that Art. 81 gives the court wide discretionary power to sanction unfair terms, this is still insufficient to ensure that the adhering party

receives adequate protection. First, the law expects the adhering party to play an active role in the enforcement process, even with his lack of legal knowledge. A trial court is prohibited from considering the unfairness on its own motion because the law requires that in order for the court to assess the terms, a request for review should first be submitted by the adhering party. This approach should be reconsidered and at least allow the court to examine unfair terms on its own motion to compensate for the inferiority in the adhering party's contractual position. Secondly, the exercise of the court's discretionary power to review unfair terms is completely optional. The law allows the court to disregard any application to review unfair terms even if it is founded on valid legal grounds. It is suggested that the Kuwaiti legislator reviews the voluntary exercise of the court's power and compels the court to review the adhering party application if it is founded in law, as well as empowering the court to raise unfairness on its own motion.

Moreover, the inclusion of amendment as a remedy for unfair terms should be revisited because it does not produce a deterrent effect. A professional would prefer to risk inserting unfair terms into his contract in the hope that the court may preserve the term itself. The purpose of the remedy should not only be aimed at alleviating the unfairness aspect of the term, but also serve the long-term purpose of continued use of unfair terms in standard contracts. Therefore, it is recommended that the law does not allow the court to modify the content of the terms and make elimination the only remedy for unfair terms.

Another matter that merits consideration is the burden of proof. The law places the burden of proving the unfairness of the terms on the adhering party. Given the ordinary adhering party's lack of legal knowledge, it is unlikely that he will be able to articulate such a legal defence. It is, therefore, recommended that the law reverses the burden of proof by requiring the professional who wishes to rely on an unfair term to prove its fairness. However, reversal of the burden of proof requires the introduction of a lucid concept of contractual unfairness based on a general standard of unfairness, and two lists containing black and grey terms.

Chapter five extended the enforcement discussion initiated in the previous chapter and investigated how to achieve positive enforcement of unfair terms. It was noted that since the existing enforcement procedure was based on individual litigation, the effect of the courts' decisions in disputes involving unfair terms would remain limited to each particular case. Such a negative enforcement approach is insufficient. On the one hand, consumers are less inclined to initiate legal proceedings due to psychological and financial factors. On the other, it does not prevent the same business, let alone other businesses, from continuing to use the same term found to be unfair in their standard contracts. The EU Commission rightly observed that "unfair terms are like the Hydra: cut off one head and others grow in"⁵⁸² and that the traditional approach to eliminating unfair terms based on individual litigation lacks the dissuasive effect. Therefore, it was proposed that the ideal solution would be the establishment of a public enforcement mechanism whereby an administrative body assumed responsibility for controlling unfair terms in the market on behalf of consumers. This body should be equipped with necessary powers that enable it to carry out its activities effectively, including the power to consider complaints, initiate investigations and commence legal proceedings. Additionally, any law reform of the enforcement mechanism should also consider granting consumer associations the right to represent consumers and intervene in legal proceedings. The practice in other jurisdictions, such as the UK, has shown that a combination of the two approaches is expected to yield the best results.

⁵⁸² Ibid., p. 24.

Bibliography

1. —, *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in Consumer Contracts COM (2000) 248 final*
2. —, *Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis, 2008, Commission Staff Working Paper (Luxembourg, European Commission 2008)*
3. —, *Opinion of the Economic and Social Committee on the 'Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts', 2001/C 116/25*
4. —, *The Explanatory Notes to the Civil Code (4th edn, Council of Ministers 2004)*
5. —, *Unfair Contract Terms Bulletin, the Office of Fair Trading, Issue No. 3 March 1997*
6. Abd Al-Aal M, *The Concept of the Weak Party in the Contractual Relationship (Cairo: Dar Annahdha Al-Arabiya 2007) (in Arabic)*
7. Abdeldayem H, *Monopoly Contracts (Alexandria, Dar Alfikr Al-Jamei 2008) (in Arabic)*
8. Abdulbaqi A, *The Theory of Contract and Unilateral Will (Cairo, Nahdhat Masr 1984) (in Arabic)*
9. Abdulbaqi O, *The Contractual Protection of the Consumer (Alexandria, Monshat Al-Maaref 2008) (in Arabic)*
10. Abdussalam S, *Contractual Balance in Adhesion Contracts (Cairo, Dar Alnahdha Alarabia 1998) (in Arabic)*
11. Abu Allail I, 'The Scope and Conditions for the Reduction of Juridical Acts' (1987) 11(2) JouroL 11
12. —, 'The Legal Meaning of Reducing Juridical Acts' (1987) 11(3) JouroL 61

13. Abu Allail I, *The Theory of Right* (Kuwait, Dar Alkutub 1997) (in Arabic)
14. —, *Contract and Unilateral Will* (2nd edn, Kuwait, Dar Alkotob 1998) (in Arabic)
15. Abudlredha A and Al-Nakkas J, *A Concise Commentary on the General Theory of Obligations*, vol 1 (Kuwait, Dar Alkutub 2006) (in Arabic)
16. Al-Ahwani H, 'Consumer Protection in the Framework of the General Theory of Contract' (Consumer Protection in Sharia and Law Conference, (UAE, 6-7 December 1998) (in Arabic)
17. —, *Sources of Obligations* (no publisher 1992) (in Arabic)
18. Al-Baih M, *The General Theory of Obligation (vol. 1)* (Cairo, Maktabat Aljala'a no year) (in Arabic)
19. Al-Khatib M, 'The Judge's Power of Amending the Contract under Yemeni, Egyptian and Islamic Laws' ((PhD thesis), Cairo, Aim Shams University 1992) (in Arabic)
20. Al-Mahdi N, *The Pre-Contractual Obligation of Disclosing Information Pertaining to the Contract and its Application on Some Types of Contracts* (Cairo, Dar Annahdha Alarabiyah 1982) (in Arabic)
21. Al-Melhem A, *Monopoly and Monopolistic Actions* (Kuwait, Kuwait University Press 1997) (in Arabic)
22. —, 'Privatisation and Protection of Investors in Kuwait : Reality and Ambition' 13 ALQ 178
23. Al-Nakkas J, 'The Expansive Direction of Judicial Interpretation of Contracts and Actions: A Study of the Decisions of Kuwaiti Court of Cassation and Comparative Law (in Arabic)' 23 JouroL 13
24. Alpa G, 'Protection of Consumers against Unfair Contract Terms: Legislative Patterns of Controlling Adhesion Contracts in Europe' 15 Willamette LRev 267
25. Al-Refai A, *The Civil Protection of the Consumer in Relation to the Content of the Contract* (Cairo, Dar Alnahdha Alarabia 1994) (in Arabic)

26. Al-Sanhuri A-A, *Middle Commentary on the New Civil Code*, vol 1 (3rd edn, Cairo, Dar Annahdha 1981) (in Arabic)
27. Al-Shemmari T, 'The Extent of Price Determination for Goods and Services under Sharia and Kuwaiti Law (in Arabic)' *Law Gaz* 141
28. Al-Sharqawi J, *The General Theory of Obligation*, vol 1 (Cairo, Dar Annahdha Alarabiyah 1993) (in Arabic)
29. Al-Yaqoub B, *Lesion in the Kuwaiti Civil Code* (Kuwait University 1987) (in Arabic)
30. Angus D, 'Abuse of Rights in Contractual Matters in the Province of Quebec' 8 *Mcgill LJ* 150
31. Armbrüster C, 'Standard Contract Terms and Information Rules' in Collins H (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008)
32. Assada AF, 'On Adhesion Contracts' ((PhD thesis), Cairo, University of Fuad I 1964) (in Arabic)
33. Atiyah P, *The Rise and Fall of Freedom of Contract* (Oxford University Press 2003)
34. Bates L, 'Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection' 16 *Emory Int'l LRev* 1
35. Beale H, 'Inequality of Bargaining Power' 6 *OJLS* 123
36. —, 'Unfair Terms in Contracts: Proposals for Reform in the UK' 27 *JCP* 289
37. Beale H, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in *Good Faith and Fault in Contract Law* (Oxford University Press 1995)
38. Beale H and others, *Cases, Materials and Text on Contract Law* (2nd edn, Oxford, Hart 2010)
39. Bell J, Boyron S and Whittaker S, *Principles of French Law* (Oxford University Press 2008)
40. Bendary M, 'Towards a Broader Concept of Consumer Protection in Adhesion Contracts' 1 *Jour Sec L*

41. Berger KP, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999)
42. Boele-Woelki K, Grosheide FW and Hondius EH, *The Future of European Contract Law* (Wolters Kluwer Law & Business 2007)
43. Bolgar V, 'The Contract of Adhesion: A Comparison of Theory and Practice' 20 *AmJCompL* 53
44. —, 'Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine' 35 *LaLRev* 1015
45. Brandner HE and Ulmer P, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' 28 *CML Rev* 645
46. Bricks H, *Les Clauses Abusives* (Librairie générale de droit et de jurisprudence 1982)
47. Bright S, 'Winning the Battle Against Unfair Contract Terms' 20 *LS* 331
48. Brownsword R, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law' in Brownsword R, Hird N and Howells G (eds), *Good Faith in Contract: Concept and Context* (Ashgate 1999)
49. Burgess A, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' 15 *Anglo-AmLR* 255
50. Burke J, 'Reinventing Contract' 10 *Murdoch U Elec JL* 2
51. Burke JJ, 'Contract as Commodity: A Nonfiction Approach' 24 *Seton Hall LegisJ* 285
52. Calais-Auloy J, 'Le Devoir de se Comporter de Bonne Foi dans les Contrats de Consommation' in Grundmann S and Mazeaud D (eds), *General Clauses and Standards in European Contract Law: Comparative Law* (Kluwer Law International 2006)
53. —, 'Les Clauses Abusives en Droit Français' in Ghestin J (ed), *Les Clauses Abusives dans les Contrats Types en France et en Europe, actes de la table ronde du 12 décembre 1990* (Librairie Générale de Droit et de Jurisprudence 1991)

54. Calais-Auloy J and Bihl L, 'Valuation of Legislative Attempts on Unfair Terms in Consumer Contracts in France' in Bourgoignie T (ed), *Unfair Terms in Consumer Contracts : Legal Treatment, Effective Implementation and Final Impact on the Consumer* (Louvain-la-Neuve 1983)
55. Calais-Auloy J and Temple H, *Droit de la Consommation* (8 edn, Dalloz 2010)
56. Calais-Auloy MJ, 'Clearing of the Market: The Mechanism for Controlling Unfair Terms (Article 7)' (The Directive on 'Unfair Terms', Five Years Later- Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999)
57. Cartwright P, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (Cambridge University Press 2001)
58. Chehata C, 'La Théorie de L'abus des Droits Chez les Jurisconsultes Musulmans' 4 RIDC
59. Chen-Wishart M, *Contract law* (Oxford University Press 2012)
60. Chitty J and Beale H, *Chitty on Contracts* (29 edn, Sweet & Maxwell 2004)
61. Collins H, 'Good Faith in European Contract Law' 14 OJLS 229
62. De Cruz P, *Comparative Law in a Changing World* (Cavendish 1999)
63. Demogue R, 'Analysis of Fundamental Notions ' in Fouillée A (ed), *Modern French legal philosophy* (Boston Book Co. 1916)
64. Deutch S, 'Control of Unfair Terms in Consumer Contracts in Israel: Law and Practice' 13 JCP 181
65. Ghestin J, 'L'abus dans les Contrats' 2 Gaz Pal 379
66. Gutteridge HC, 'Abuse of Rights' 5 CambLJ 22
67. Ebers M, 'Unfair Contract Terms Directive (93/13)' in Schulte-Nölke H, Twigg-Flesner C and Ebers M (eds), *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier 2008)

68. Ebke W and Steinhauer B, 'The Doctrine of Good Faith in German Contract Law' in Beatson J and Friedmann D (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1997)
69. Fabre-Magnan M and Sefton-Green R, 'Defects on Consent in Contract Law' in Hartkamp A and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004)
70. Fathy M, 'La Notion de L'abus des Droits dans la Jurisprudence Musulmane' ((PhD thesis), impr. de A. Mulcey 1912)
71. Fauvarque-Cosson B, Mazeaud D and Racine J-B, *European Contract Law: Materials for a Common Frame of Reference* (Sellier 2008)
72. Fodah A, *The Interpretation of Contracts in Egyptian and Comparative Law* (Alexandria, Mosha'at Al-Ma'aref 1984) (in Arabic)
73. François Terré, Simler P and Lequette Y, *Droit civil: Les obligations* (9th edn, Dalloz 2005)
74. Friedmann D and Beatson J, *Good Faith and Fault in Contract Law* (Clarendon Press 1995)
75. Furmston M, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press 2007)
76. Gemei H, *The Effect of Inequality between Contractors on the Contract Terms* (Cairo, Dar Annahdha Alarabia 1991) (in Arabic)
77. —, *Consumer Protection: the Special Protection of the Consumer's Consent in Consumer Contracts* (Dar Annahdha Alarabiyah 1996) (in Arabic)
78. Ghestin J, *Les Clauses Abusives dans les Contrats Types en France et en Europe: Actes de la Table Ronde du 12 décembre 1990* (Librairie générale de droit et de jurisprudence 1991)

79. —, ‘The Pre-Contractual Obligation to Disclose Information’ in Harris D and Tallon D (eds), *Contract Law Today, Anglo-French Comparisons* (Oxford University Press 1989)
80. —, *Traité de Droit Civil—La Formation du Contrat* (3rd edn, Librairie générale de droit et de jurisprudence 1993)
81. Ghestin J and Goubeaux G, *Traité de Droit Civil: Introduction Générale* (Librairie générale de droit et de jurisprudence 1994)
82. Girot C, *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kluwer Law International 2001)
83. Harris D and Tallon D, *Contract law today: Anglo-French comparisons* (Clarendon Press; Oxford University Press 1989)
84. Hartkamp A and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004)
85. Hasan AA, *Consumer Protection* (Cairo, Dar Annahdha Alarabiyah 1996) (in Arabic)
86. Hejazi A, *The General Theory of Obligations According to the Kuwaiti Law: A Comparative Study*, vol 1 (Kuwait University Press 1982) (in Arabic)
87. Hesselink M, ‘The Concept of Good Faith’ in Hartkamp A and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004)
88. Hondius E, ‘Unfair Contract Terms - New Control Systems’ 26 *AmJCompL* 525
89. —, ‘The Legal Control of Unfair Terms in Consumer Contracts: Some Comparative Observations’ in Bourgoignie T (ed), *Unfair Terms in Consumer Contracts* (Louvain-la-Neuve 1983)
90. —, ‘EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract’ 7 *JCL* 34
91. Hondius EH, *Unfair Terms in Consumer Contracts* (Molengraaff Instituut voor Privaatrecht 1987)

92. —, 'Unfair Terms in Consumer Contracts: Towards a European Directive'
EuropConsumer LJ 180
93. —, 'The Reception of the Directive on Unfair Terms in Consumer Contracts by
Member States' 3 ERPL 241
94. Howells G, Ramsay I and Wilhelmsson T (eds), *Handbook of Research on
International Consumer Law* (Edward Elgar 2010)
95. Howells G and Schulze R, *Modernising and Harmonising Consumer Contract Law*
(Sellier 2009)
96. Howells G and Weatherill S, *Consumer Protection Law* (Ashgate 2005)
97. Howells G and Wilhelmsson T, *EC Consumer Law* (Aldershot, Ashgate 1997)
98. Hussain MA, *Introduction to Legal Studies: The Right Theory* (Cairo, Dar Annahdha
1996) (in Arabic)
99. Kamba WJ, 'Comparative Law: A Theoretical Framework' 23 ICLQ 485
100. Karimi A, *Les Clauses Abusives et la Théorie de L'abus de Droit* (Librairie Générale
de Droit et de Jurisprudence 2001)
101. Keerah H, *Introduction to Law* (Alexandria, Monshaat Almaaref no date) (in Arabic)
102. Kessler F, 'Contracts of Adhesion - Some Thoughts About Freedom of Contract' 43
ColumLRev 629
103. Kessler F and Fine E, 'Culpa in Contrahendo, Bargaining in Good Faith and Freedom
of Contract: A Comparative Study",(1964)' 77 HarvLRev 401
104. Kimball SL and Pfennigstorf W, 'Administrative Control of the Terms of Insurance
Contracts: A Comparative Study' 40 IndLJ 143
105. Kornhauser LA, 'Unconscionability in Standard Forms' CalifLRev 1151
106. Korobkin R, 'Bounded Rationality, Standard Form Contracts, and Unconscionability'
70 UChiLRev 1203
107. Law Commission, *Second Report on Exemption Clauses* (Law Com No 69), 1975

108. Law Commission and Scottish Law Commission, *Unfair Terms in Contracts*, (A Joint Consultation Paper Law), Commission Consultation Paper no 166, Scottish Law Commission Discussion Paper no 119, (2) 2002
109. —, *Unfair Terms in Contracts*, (Law Com No 292, Scot Law Com No 199), 2005
110. —, *Unfair Terms in Consumer Contracts: A New Approach?*, issues paper, 25 July 2012
111. Leff AA, 'Unconscionability and the Crowd-Consumers and the Common Law Tradition' 31 UPittLRev 349
112. Legrand PJ, 'Pre-contractual disclosure and information: English and French law compared' 6 OJLS 322
113. —, 'Information in formation of contracts: a civilian perspective' 19 CBLJ 318
114. Lenhoff A, 'Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law' 36 TulLRev 481
115. Limpens J, Kruithof R and Meinertzhagen-Limpens A, 'Liability for One's Own Act' in Tunc A (ed), *International Encyclopedia of Comparative Law*, vol XI (Mohr 1979)
116. Llewellyn KN, '(Book review) The Standardization of Commercial Contracts in English and Continental Law' 52 HarvLRev 700
117. Lockett N and Egan M, *Unfair terms in Consumer Agreements : The New Rules Explained* (Wiley 1995)
118. Loos M, 'Rights of Withdrawal' in Howells G and Schultze R (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009)
119. Lotfi M, *Civil Liability in the Negotiation Phase* (Cairo, no publisher 1995) (in Arabic)
120. —, *Introduction to the Study of Law* (6th edn, Cairo, no publisher 2008) (in Arabic)
121. Macdonald E, 'The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations' 58 CambLJ 413

122. Mak C, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International 2008)
123. Mazeaud H and Tunc A, *Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle*, vol Vol 1 (5th edn, Paris, Montchrestien 1975)
124. McConnell C, Brue S and Flynn S, *Microeconomics: Principles, Problems, and Policies* (19th edn, McGraw-Hill/Irwin 2012)
125. McKendrick E, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2005)
126. Micklitz H-W, 'German Unfair Contract Terms Act and the EC Directive 93/13' in Lonbay J (ed), *Enhancing the Legal Position of the European Consumer* (British Institute of International and Comparative Law 1996)
127. Micklitz H-W, 'Report on the Practical Implementation of Directive 93/13/EEC in the Federal Republic of Germany' (The Directive on 'Unfair Terms', Five Years Later-Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999)
128. Micklitz H-W, Reich N and Rott P, *Understanding EU Consumer Law* (Intersentia 2009)
129. Micklitz H-W, Stuyck J and Terryn E, *Cases, Materials and Text on Consumer Law* (Hart 2010)
130. Murkus S, *An Adequate Commentary on Civil Law*, vol 1 (4th edn, Cairo, Dar Alkotob 1987) (in Arabic)
131. Nebbia P, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (Hart 2007)
132. —, 'Unfair Contract Terms' in Twigg-Flesner C (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010)
133. Naude T, 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' 124 SALJ 128

134. —, ‘Enforcement Procedures in Respect of the Consumer’s Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective’ 127 SALJ 515
135. Nicholas B, *The French Law of Contract* (Oxford, Clarendon Press 1992)
136. —, ‘The Obligation to Disclose Information: English Report’ in Harris D and Tallon D (eds), *Contract law today: Anglo-French comparisons* (Clarendon Press 1998)
137. —, *OFT Response to the Law Commission Issues Paper*, OFT 1456, November 2012
138. Omran A-S, *The Protection of the Consumer during the Formation of the Contract* (Alexandria, Monshat Al-Maaref 1986) (in Arabic)
139. Örucü E, *The Enigma of Comparative Law: Variations On A Theme For The Twenty-first Century* (Martinus Nijhoff Publishers 2004)
140. Paisant G, ‘Les Clauses Abusives et la Présentation des Contrats dans la Loi n° 95-96 du. 1er Février 1995’ D Chron
141. Patterson EW, ‘The Delivery of a Life-Insurance Policy’ 33 HarvLRev 198
142. —, ‘The Interpretation and Construction of Contracts’ 64 ColumLRev 833
143. Planiol M and Ripert G, *Traite Pratique de Droit Civil Francais*, vol VI Obligations (Librairie Generale de Droit et de Jurisprudence 1952)
144. Powell R, ‘Good Faith in Contracts’ 9 CLP 16
145. Priest GL, ‘A Theory of the Consumer Product Warranty’ 90 Yale LJ 1297
146. Rabahi A, ‘The Protection of the Contract Parties against Unfair Terms’ ((PhD thesis), Wahran University 2008) (in Arabic)
147. Ragheb W and Abudlfattah A, *The Principles of the Kuwaiti Civil Proceedings According to the New Civil Proceudue Law* (2nd edn, Kuwait, Dar Alkutub 1994) (in Arabic)
148. Rakoff TD, ‘Contracts of Adhesion: An Essay in Reconstruction’ 96 HarvLRev 1173

149. Reich N, 'The Implementation of Directive 93/13/EEC on Unfair Terms in Consumer Contracts in Germany' 5 ERPL 165
150. Rothchild J, 'Protecting the Digital Consumer: The Limits of Cyberspace Utopianism' 74 IndLJ 5
151. Saleilles R, *De la déclaration de volonté; contribution à l'étude de l'acte juridique dans le Code civil allemand (art. 116 à 144)* (F. Pichon 1901)
152. Schulte-Nölke H, Twigg-Flesner C and Ebers M, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Sellier. European Law Publishers 2008)
153. Scott C, Black J and Cranston R, *Cranston's Consumers and the Law* (Butterworths 2000)
154. Sefton-Green R, 'Duties to Inform versus Party Autonomy: Reversing the Paradigm (from Free Consent to Informed Consent)?-A Comparative Account of French and English Law' in Geraint H, Janssen A and Schulze R (eds), *Information Rights And Obligations: A Challenge For Party Autonomy And Transactional Fairness* (Ashgate 2005)
155. —, 'A Comparison of the Institutional Implications of the Directive on Unfair Terms in Consumer Contracts in France and the UK' in Rutgers J (ed), *European contract law and the welfare state* (Europa Law Publishing 2012)
156. Slawson D, 'Mass Contracts: Lawful Fraud in California' 48 S Calif L Rev 1
157. —, 'Standard Form Contracts and Democratic Control of Lawmaking Power' 84 HarvLRev 529
158. Spencer J, 'Signature, Consent, and the Rule in L'Estrange v. Graucob' 105 CambLJ
159. Stuyck J, 'Unfair Terms' in Howells G and Schulze R (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009)
160. Sultan A, *Sources of Obligations* (Alexandria, Monsha'at al-Ma'aref 1996) (in Arabic)

161. Tenreiro M, 'Conclusion' (The Directive on 'Unfair Terms', Five Years Later-Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999)
162. Tenreiro M and Jens K, 'Unfair terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive' in Schulte-Nölke H and Schulze R (eds), *Europäische Rechtsangleichung und Nationale Privatrechte* (Nomos 1999)
163. Terryn E, 'The Right of Withdrawal, the Acquis Principles and the Draft Common Frame of Reference' in Schulze R (ed), *Common Frame of Reference and Existing EC Contract Law* (Sellier 2008)
164. Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' 61 MLR 11
165. Thiry-Duarte M-O, 'Rapport sur l'application Pratique de la Directive 93/13/CEE en France' (The Directive on 'Unfair Terms', Five Years Later- Evaluation and Future Perspectives Conference, Brussels, 1-3 July 1999)
166. Twigg-Flesner C, 'The Implementation of the Unfair Contract Terms Directive in the United Kingdom' 8 CIL 235
167. —, *The Europeanisation of Contract Law: Current Controversis in Law* (Routledge-Cavendish 2008)
168. Twigg-Flesner C and Schulze R, 'Protecting Rational Choice: Information and the Right of Withdrawal' in Howells G, Ramsay I and Wilhelmsson T (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010)
169. Van den Bergh R and Visscher L, 'The Preventive Function of Collective Actions for Damages in Consumer Law' 1 ELER 5
170. Van Erp S, 'The Pre-Contractual Stage' in Hartkamp A and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004)
171. Vickers J, 'Contracts and European Consumer Law: An OFT Perspective' in Vogenauer S and Weatherill S (eds), *Harmonisation of European contract law: Implications for European Private Laws, Business and Legal Practice* (Hart 2006)

172. Vigneron S, 'The Implementation of the Unfair Contract Terms Directive in France'
8 CIL 105
173. Von Mehren A, 'A General View of Contract' in Von Mehren A (ed), *International Encyclopedia of Comparative Law*, vol VII (Tübingen 1982)
174. —, 'A General View of Contract' in Von Mehren A (ed), *International Encyclopedia of Comparative Law*, vol VII Contracts in General (JCP Mohr 1990)
175. Vranken M, *Fundamentals of European civil law and impact of the European Community* (Blackstone 1997)
176. Waly F, *Compendium on Civil Procedure Law* (Cairo, Dar Annahdha 1981)
177. Whittaker S, 'Assessing the Fairness of Contract Terms : the parties' "essential bargain", its regulatory context and the significance of the requirement of good faith'
12 Z Eu P 75
178. Wilhelmsson T, 'Administrative Procedures for the Control of Marketing Practices-Theoretical Rationale and Perspectives' 15 JCP 159
179. Wilhelmsson T and Willett C, 'Unfair Terms and Standard Form Contracts' in Howells G, Ramsay I and Wilhelmsson T (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010)
180. Willett C, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate 2007)
181. Wilson N, 'Freedom of Contract and Adhesion Contracts' 14 ICLQ 172
182. Wrška S, Van Uytsel S and Siems MM, *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge, Cambridge University Press 2012)
183. Zahra M, *Sale of Buildings under Construction* (Kuwait, Kuwait University 1998) (in Arabic)
184. Zaki MJ, *A Concise Commentary on the Obligation Theory* (Cairo, Cairo University Press 1976) (in Arabic)

185. Zimmermann R and Whittaker S, *Good Faith in European Contract Law* (Cambridge University Press 2000)
186. Zweigert K and Kötz H, *An Introduction to Comparative Law* (Clarendon 1998)

Table of Legislation

Kuwait

The Civil Code (Law No. 67/1980)

The Commercial Code (Law No. 68/1980)

The Maritime Trade Code (Law No. 28/1980)

The Civil and Commercial Procedure Code (Law No. 38/1980)

Evidence Law in Civil and Commercial Matters (Law No. 39/1980)

Emiri Decree of 22/6/1983

The Protection of Competition Code (Law No. 10/2007)

Employment in the Private Sector Law (Law No. 6/2010)

International

Vienna Convention on the International Sale of Goods and the UNIDROIT Principles of
International Commercial Contracts

The UNIDROIT Principles of International Commercial Contracts

Europe

Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts,
Official Journal L 095, 21/04/1993 P. 0029 – 0034

The Principles of the European Contract Law

Egypt

The Civil Code (Law No. 131/1948)

France

Code civil des Français (French Civil Code)

The Code de la Consommation (Consumer Code)

Loi n° 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de
produits et de services

Germany

Bürgerliches Gesetzbuch (BGB) (German Civil Code)

Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)
(Standard Contract Terms Act) of 19 December 1976

United Kingdom

The Unfair Contract Terms Act, 1977 (UCTA)

The Unfair Terms in Consumer Contracts Regulations, 1999 (UTCCR)

Table of Cases

Kuwait

(1) Court of Cassation

Commercial Cassation No. 33/1975, 29/6/1977

Commercial Cassation No. 25/96, 1/12/1992

Commercial Cassation No. 69/1992, 6/12/1992

Commercial Cassation No. 37/1993, 1/2/1993

Commercial Cassation No. 2/93, 25/10/1993

Commercial Cassation No. 54/1994, 17/4/1994

Civil Cassation No. 41/94, 20/2/1995

Commercial Cassation No. 95/1995, 12/12/1995

Commercial Cassation No. 308/1996, 22/2/1996

Commercial Cassation No. 217/95, 24/11/1996

Commercial Cassation No. 55/96, 26/1/1997

Commercial Cassation No. 101/89, 2/11/1998

Commercial Cassation No. 93/97, 9/3/1998

Commercial Cassation No. 650/99, 9/4/2000

Commercial Cassation No. 179/99, 7/5/2000

Civil Cassation No. 156/2002, 30/9/2002

Commercial Cassation No. 1208/2006, 1/6/2008

Commercial Cassation No. 934/2004, 4/3/2006

(2) Court of Appeal

Civil Appeal No. 10/85, 27/3/1985

Commercial Appeal No. 428/89, 5/12/1989

Commercial/Administrative Appeal No. 1024/89, 14/11/1989

Commercial Appeal. No. 770/94, 19/12/1994

Commercial Appeal. No. 142/95, 27/11/1995

European Union

(1) Judgments of the European Court of Justice

ECJ Judgment of 27 June 2000, Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero* ECR I-04941
Case C-372/99, 24 January 2002 *Commission v Italian Republic*
ECJ judgment of 21 November 2002, C-473/00, *Cofidis v Fredout* [2002] ECR I-10875.
ECJ judgment of 26 October 2006, C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421.
ECJ judgment of 4 June 2009, C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi* [2009] ECR I-4713
ECJ judgment of 14 June 2012, C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*

(2) Opinions of the Advocate General

Opinion of the Advocate General Trstenjak delivered on 6 July 2010 in C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECR I-0000
Opinion of the Advocate General Trstenjak delivered on 14 February 2012 in *Banco Español de Crédito SA v Joaquín Calderón Camino*

Egypt

Damanhur District Court (Civil) No. 346/1946, 14/12/1946

France

Court of Colmar, 2 May 1855, D.P. 1856.2.9

Aix 15.2.1950, JCP, 1950, I, 5548

Lyon, 15.7.1952, D 1952, 753

Cass. Civ. (3) 16/10/1973, D. 1974, IR 35

Cass. Com. 14.1.1969

Cass Civ. (1), 6 January 1994

Germany

BGH 17 January 1989, NJW 1989

BGH, 19 May 2005, NJW 2005, 2543

BGH, 3 December 1991, NJW 1992

UK

Carter v Boehm (1766) 3 Burr 1905

Printing and Numerical Registering Co. v Sampson (1875) LR 19 Eq. 462 at 465

Parker v South Eastern Railway [1877] 2 CPD 416

L'Estrange v F Graucob Ltd [1934] 2 KB 394

Schroeder Music Publishing Co. Ltd v Macaulay [1974] 1 W.L.R. 1308

McCrone v Boots Farm Sales Ltd 1981 SC 68

George Mitchell Ltd v Finney Lock Seeds Ltd [1983] QB 284, 314

Stag Line Ltd v Tyne Ship Repair Group Ltd [1984] 2 Lloyd's Rep 211

Banque Financière de la Cité SA v Westgate Insurance Co Ltd [1989] 2 All ER 952.

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433

Walford v Miles [1992] 2 A.C. 128

Philips Electronique Grand Publique SA v British Sky Broadcasting Ltd [1995] EMLR 472;

Timeload Ltd v British Telecommunications plc [1995] EMLR 459;

Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd (1996) 78 Build LR 42

St Albans City and District Council v International Computers Ltd [1996] 4 All ER 481.

Director General of Fair Trading v First National Bank; Court of Appeal ([2000] QB 672, 687); House of Lords ([2001] UKHL 52)

Pegler Ltd v Wang (UK) Ltd [2000] EWHC Technology 127.

Watford Electronics Ltd v Sanderson CFL Ltd [2000] 2 All ER (Comm) 984.

Haines v Carter [2002] UKPC 49.

UK Housing Alliance (North West) Ltd v Francis [2010] EWCA Civ 117

United States

Lochner v New York, 198 U.S. 45 (1905);

Coppage v Kansas, 236 US 1, 27 (1915)