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A glance at unfair terms in consumer transactions in Arab legal systems and Islamic law: what Arab lawyers can learn from the European experience?

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Abstract: The first decade of the 21st century demonstrated significant legal activities in the area of consumer protection in many Arab legal systems. The declared objectives require breaking down the use of unfair terms in market transactions. Islamic law, a legal base of these legal systems, provides many guidelines and general rules that can, directly and indirectly, get over the use of these terms. This paper will discuss the issue of to what the extent the rules of Arab regulations deal with the use of unfair terms in consumer transactions. It will compare it with the European Directive on Unfair Terms in consumer contracts and determine how the Directive can be adopted by the Arab countries without violating the general principles of Islamic law. To recommend the implementation of the European measures in Arab legal systems, it is important to detect the supporting and contradicting points in the Arab legal systems, including Islamic rules.

Keywords: unfair contract terms; Islamic law; consumer protection; unfair terms; consumer in private law; consumer protection in Islam; consumer in Arab law; the proposal of consumer rights.

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1 Introduction

The first decade of the 21st century demonstrated significant legal activities in the area of consumer protection in many Arab legal systems. It was enacted in the following countries: 2005 in Lebanon[1] and Palestine;[2] 2006 in Egypt[3] and the United Arab Emirates;[4] 2008 in Qatar[5] and Syria;[6] and 2010 in Iraq[7]. In Jordan, the proposal of consumer protection is expected to be enforced soon.[8] The consumer protection law was

enacted in 1992 in Tunisia.[9] These countries decided the importance of creating a regulatory frame aimed at protecting consumers when making legal transactions. The content of these laws was, to some extent, similar. They pay reasonable attention to specific subjects of consumer protection such as advertising;[10] guarantee of hidden defects of products[11] and the conditions of imported and used goods.[12] In contrast, controlling the use of unfair terms in consumer transactions did not get the same attention, although the declared objectives of those laws cannot be attained without getting over the use of these terms. However, in Lebanon, the situation is different. In addition, the constitutions of those legal systems recognise Islamic rules as a source of law. Islamic law constitutes the legal base used to control the use of unfair terms in market transactions.[13] This means that there is a legislative gap in these legal systems in the area of consumer protection, simply because this protection cannot attain its exemplary outcomes without getting over the use of unfair terms in market transactions. To what extent can this gap be filled through studying and benefiting from the European approach? This question is the target of research in this paper.

The adoption of the Directive (93/13) of unfair terms in consumer contracts (hereafter the directive)[14] can be considered as the first significant European attempt to regulate the use of unfair terms in consumer contracts.[15] This directive adopts two main principles in order to ensure fairness in market transactions, namely the principle of transparency and the principle of good faith. It also provides an indicative list of terms to facilitate the application of the principle of good faith. On October 8, 2008, the European Commission adopted the proposal of a directive on consumer rights (hereafter the Proposal), having the aim of revising four directives including the Directive.[16] The objective of the proposal is to contribute to the better functioning of the business to consumer internal market by enhancing consumer confidence in the internal market and reducing business reluctance to trade cross-border. This overall objective should be achieved by decreasing the fragmentation, tightening up the regulatory framework and providing consumers with adequate information and proper methods to practice their rights. This proposal provided the same two rules to get over the use of unfair terms. It provides two lists of unfair terms (black and indicative lists).[17]

To recommend the implementation of the European measures in Arab legal systems, it is important to detect the supporting and contradicting points in Arab legal systems, including Islamic rules.[18]

2 The legal notion of unfair terms

A contract is defined as: "*what the parties bind themselves and undertake to do with reference to a particular matter*".[19] This definition deals with the will of the contracting parties as the main instrument for making law between them. The theory of contract supposes that there is a reasonable balance between the contracting parties to organise their agreements. This includes their ability to keep the balance of their rights and obligations via proposing, negotiating, and deciding the terms of the agreement.[20]

In consumer contracts, this situation does not exist. One of the contracting parties (the seller) usually constitutes the terms of the agreement in advance. The encounter party (the consumer) is told to sign them after investigating some contract terms (namely, core contract terms that determine the price and the quality of the purchased product). Thus, a

seller abuses his power by drafting contract terms that serve his own interests, and does not consider the interests of consumers.[21] In consequence, the use of unfair terms in these contracts appears broadly. The ideal model of making contracts requires that the interests of each contractor have to be considered when making, altering, and terminating this contract.[22] Thus, the notion of unfairness can be classified under three main categories, the right of the contracting party to exclude or limit rights and liabilities (exclusion terms); the right to alter contract terms individually (variation terms); and the right to impose unreasonably compensation remedies (penalty terms) upon the counter party.

3 The definition of consumer

3.1 The definition of consumer in the European approach

The Proposal of the directive on consumer rights applies only to "contracts between consumers on one side and sellers or suppliers on the other side. Article (2) of the Proposal defines a 'consumer' as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".[23] This definition shows that a person other than a natural person, in particular a legal entity, cannot be regarded as a consumer for the purposes of the Directive. In his opinion in *Cape Snc v Idealservice Srl; Idealservice MN RE Sas v OMAI Srl* (C-541/99 and 542/99), A.G. Mischo further supports this by pointing out that, legal persons and companies do not generally find themselves in the position of consumers that, according to the Court, constitutes the rationale underlying the Directive.[24] The term 'outside his trade, business or profession' may create a confusion regarding the base of this definition (the functions or the competence base). First, the function base refers to the consumer as the person who consumes goods or services for his personal or family needs, not for producing or distributing other goods or services.[25] This base was adopted by the European Court of Justice (hereafter the ECJ) in the case regarding other European directive that has similar definition.[26] In the case "*Bayerische Hypotheken- und Wechselbank AG v Dietzinger*",[27] the ECJ accepted that, a contract of guarantee may in principle fall in the directive, even though it was made for the benefit of a third party who is standing outside the contract in question.[28]

Second, the competence-based approach refers to the consumer (a person who deals with commercial market activities) as a weak party. This weakness, arising from any reason, creates a status of non-balance between the contracting parties.[29] As a result, a consumer will be in a position of technical inferiority compared to the counter party. Therefore, the function of the law is not limited to protect the party who gratifies personal or family needs; it extends to protect the weak party who deals with market transactions activities.[30]

3.2 The definition of consumer in Arab legal systems

Islamic law, as well as the civil codes of Arab legal systems, does not provide a clear definition for the term 'consumer'. The definition of the term 'consumer' in the laws of consumer protection in Arab states is not harmonised.

A good definition needs to address the following two questions: is it exclusive to natural persons or may include the legal entities; does it extend to include small sellers

and suppliers when they make market transactions concerning their commercial activities?

In Egypt, the UAE, Qatar, and Tunisia, a consumer is only the natural person who makes legal transactions for personal or family needs (function-based approach).[31] A legal person who makes legal transactions not concerning to his commercial activities is also a consumer in Lebanon, Syria, Iraq and Palestine.[32]

Islamic *Fiqh* avoids limiting the scope of protection by not putting a specific definition for consumer.[33] Islamic economy addresses the definition of consumer as any person buying goods or services which have been paid for under any system of payment including hiring, purchasing, leasing, … etc.[34] In Islamic economics, a consumer behaves in a normative way because Islam describes what a person must and must not do. Islamic law does not distinguish between a person and another when prohibiting any action. A consumer has to make choice regarding spending on worldly needs as well as in the way of God *Allah*.[35] In Islam, the circulation of the economic activities considers not only the needs of individuals and markets, but the religious believes also.[36] For instance, the economic welfare of some individuals and firms may encourage the elements of production, distribution, and consumption. All activities concerning the use of alcoholic drinks are absolutely prohibited in Islam regardless of their positive economic outcomes.[37] Hence, individuals have to take into consideration the injunctions of Islam in pursuing activities, and not only the rankings of utility or profitability. So, it is not important to distinguish between the actions of consumers and non-consumers because the action itself is prohibited regardless of the party who makes it. In addition, there are no specific limitations for the theory of economy in Islamic regime. Islamic economics is more restricted, and in other sense it is more comprehensive than other general economics.[38] Islamic law pays attention to the concept of consumption rather than the notion of a party making the action of consumption. It aims to serve the requirements of Muslim belief *Aqeeda* before and in addition to the requirements of Muslim welfare. Therefore, most of academic literatures, concerning consumer protection in Islamic law, begin with explaining the conception of consumption according to Islamic *Fiqh*, and do not address the definition of the consumer.[39] Consumption is defined as the direct use of permissible goods and services *which gratify the needs and wishes* of the user of these products.[40] This may make the concept of a consumer more comprehensive than in other legal systems.[41] For instance, the action of usury *Riba* is not allowed in Islam,[42] and this prohibition includes the activities of natural and legal persons.

4 The concept of unfair terms

4.1 The definition of unfair terms

The definition of unfair terms can be understood according to the source, the nature and the impact of these terms. Regarding the source, the unfair term may be defined as the term which arises because of the abuse of power of one contracting party, and at the same time reflects this power[43] (see article 35 of the French consumer protection law number 22⁄78 of 10 January 1978).[44]. The nature-base of this definition refers to its contradiction with the principles of honesty, truth, and good faith that have to rule legal transactions. In other words, it contradicts with the requirements of justice that law has to preserve.[45] The Egyptian Cassation Court adopted this approach when defining the unfair term as "the

term that is drafted in contradiction with the core objectives of contract, because it contradicts with the public order".[46] According to the impact approach, unfair term is the term that transfers the responsibilities of the contracting parties to the extent of breaching the balance of the contract terms. This was ruled by the Committee of Ministers of the Council of Europe in its resolution No. 47/76 regarding the appropriate method to control the use of unfair terms in consumer contract.[47] This resolution defined the unfair term as a term that *places consumers in a position of inferiority which is prejudicial to their interests*. It also *causes a balance of rights and obligations under the contract as a whole contrary to the interests of consumers*.[48] The consumer protection law of Lebanon adopted this approach in its article (26).[49] The Proposal takes into consideration these three bases when providing the definition of unfair terms.[50] According to article (32), the term is unfair if it is not individually negotiated (the source base), contrary to the requirement of good faith contract (the nature base), and creates a significant imbalance of rights and obligations between the contracting parties (the impact base).[51]

4.2 The purpose of unfair terms

The use of unfair terms has many purposes. The forms of these terms can be classified into three main groups. First, exclusion terms (exclusion clauses), where according to the Egyptian Cassation Court, the aim of these clauses is to exclude, limit, or restrict the liability of the contracting party[52], second, variation clauses that empowers one contracting party to control the terms of the contract without consulting the other party or paying attention to his interests. And third, penalty clauses which appear when the agreed amount of compensation is unreasonably higher than the real loss of the contracting party, while the counter party does not have the same advantage of compensation.[53] The excessive advantage, which sellers attain from the use of unfair terms, can be considered as a rational consequence of the use of these terms.[54]

4.3 The importance to control the use of unfair terms

The use of unfair terms in market transactions reflects a special legal relation, where one contracting party controls the terms of the agreements to serve his own legal and economic interests. Consumer transactions usually follow constant scenarios. A consumer has no time to read the contract terms. If he reads them, he may be unable to understand their meaning and consequences. If he understands them and records an objection to any of them, the response would be to take it or leave it en bloc without any amendments. If he shops around the market, he will face the same contract terms with other suppliers.[55] In short, a consumer will not be able to influence the contract terms, and therefore will not be able to negotiate and bargain them. These circumstances reflect the inequality of bargaining power between the contracting parties. The status of consumers in this regard justifies the importance to control the use of unfair terms in market transactions to have justice in these transactions.

4.4 The bargaining power of the contracting parties

The power of individuals or institutions is the ability to achieve something, whether by right, by control or by influence.[56] In economic science, the power is the ability to

mobilise economic forces to achieve a specific result. It can be measured by the probability of achieving this result in face of various kinds of obstacles or oppositions. It may be exercised unknowingly, although of course it is frequently deliberate.[57] The dissimilarity of *the economic position and the legal knowledge* between sellers and consumers regarding the subject matter of the contract encourages sellers to use this power to impose unfair terms upon consumers.[58] Due to his economic, intellectual or psychological superiority, the entrepreneur will be capable of dictating his contract terms one-sidedly to the consumer's detriment. The exposition of F. Kessler has become a classic: "*Standard contracts are typically used by enterprises with strong bargaining power. Standard contracts ... could ... 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*."[59] This paradigm of 'inequality of bargaining power' has proven to be extremely popular by the ECJ as the underlying rationale of Directive. For instance, the system of protection that is introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, whether in bargaining power or level of knowledge.[60] This makes the consumer consent to contractual terms that are determined in advance by the seller or supplier without being able to influence them. Thus, the abuse of power is the base, which limits the application of the Directive to the term in question.[61] The ECJ underlined this limit when it provided that, the national court is obliged when applying its national provisions to interpret those provisions, as far as possible, *in the light of the wording and purpose of the directive*.[62] Thus, the national judge has to investigate *the potential of unfairness* to decide the application of the test of fairness. This investigation should mainly depend on the *objective ambit* of this term (get over the abuse of power of the seller).

4.5 The concept of weakness in market transactions

Legal scholars in the Middle East are familiar with the above arguments. Contractual weakness arises from the real inequality of positions between the contracting parties. It means that one of them, practically, is in a weak position in face of the counter party. This weakness deals with the will of the contractor, and influences its validity according to its status, gravity, and degree. According to these scholars, the contractual weakness has two forms: [63] the economic and the ignorance weakness.

4.5.1 The economic weakness

According to the Jordanian Cassation Court, economic weakness occurs where one party is bound to agree on the offered contract terms determined by the encounter party without the right to negotiate, bargain or influence them.[64] The seller has the capacity to dominate the counter party because of his influence, power and status.[65] Therefore, and according to this definition, the weak party is the party who lacks enough power to make, determine and control the content of the agreement.[66] This position can be described as an advantage of one contractor. It violates the requirements of fair or moral transactions. This justifies the intervention of the State to rebalance the legal consequences arising under the use of this power.[67] Based on this explanation, anyone making contracts in the following positions may be considered as a weak party, namely:[68] the person who consents contract terms without the right to negotiate or bargain its content; the person

who needs making the transaction, and cannot find another way to gratify his needs; the person who receives drafted contracts, which impose maximum duties upon him and minimum duties upon the drafter party. These positions address the use of adhesion contracts, where there is an inequality of the economic position between the contracting parties.[69] In Arab legal systems, the acceptance in these contracts, according to the Jordanian Cassation Court, is limited to admitting all conditions that are provided by the other party. They are not subject to negotiation. Thus, the acceptance of consumers reflects the status of submission and *compliance*, and not the status of the free will or an optimal acceptance.[70]. In adhesion contracts, the weak party is limited by two choices; whether to approve or disapprove the contract en bloc. This reality makes the conception of weakness extends to include small sellers and suppliers that make legal transactions with monopolists.[71] In these transactions, a trader, who makes a contract concerning the sale of his business, can be considered as a weak party once he cannot influence the terms of the agreement.[72] For this reason, to control the use of unfair terms in adhesion contracts, many legal systems in the Middle East, including Egypt, Jordan, Syria, Kuwait, Lebanon, Morocco, Yemen, and Palestine, provide a special protection for the weak party in these contracts.[73] In these legal systems, the national judge is authorised to amend and rule out unfair terms used in these contracts.

4.5.2 The ignorance weakness

Ignorance weakness arises from the disparity of experience and knowledge between the contracting parties. The consent of the contracting party may be defective because he lacks this information, facts and experience that address the contract.[74] This disproportion is not economical but educational. It deals with the resources of experience, intelligence and knowledge of the subject matter of the contract.[75] The ignorance weakness comes through two ways. The first is through the impossibility of getting access to the contract information and data. The second is through the lack of understanding of the meaning and the consequences of these data. The first way is objectivity, where the status of ignorance deals with the subject matter of the contract.[76] The second way is personality, where the status of ignorance deals with the own personality of the contractor, because he lacks enough knowledge that enables him to evaluate and understand these data. This means that, the ignorance weakness occurs where: the contractor cannot get an access to all information regarding the object of the contract; or he cannot assess his legal position arising under the use of the contract terms. These two reasons, commonly, occur because of the use of standard form contract terms (hereafter SFC) in market transactions.[77] The use of this sort of contracts, in Arab legal systems, is not prohibited and the legislators in this area do not secure enough protection for consumers when these terms are used in market transactions. This matter also may justify the importance of the legal intervention to get over the consequences of the use of these contracts (the use of unfair terms).

4.6 The legal base to control the use of unfair terms in Arab legal systems

4.6.1 The legal base in consumer protection laws

The laws of consumer protection in Arab countries constitute many provisions providing, directly and indirectly, the consumer right to be protected from the use of unfair terms in market transactions. Directly, the impartiality of economic transactions[78] and the

transparency conditions of legal transactions are provided in many articles of these laws.[79] Only article 26 of the consumer protection law in Lebanon defines the unfair term, prohibits its use and annuls it where it is used in market transactions. Otherwise, other legal systems do not constitute the way to make this control. Indirectly, Arab legislators agreed on the following rights for consumers: the right of protection in a manner ensuring that consumers shall not be prone to any *inequity or economic losses*,[80] the right to receive *a fair treatment* without discrimination by the supplier of the product or the manufacturer,[81] the right to access *fair transactions*,[82] the consumer right of choice,[83] the consumer right to get full information regarding the terms and the objective of the agreement[84] and the right to get goods and services without defecting his economic interests.[85] Unfortunately, these laws do not contain provisions regarding the invalidity of unfair terms.

4.6.2 The legal basis in Islamic law

Islamic law provides many rules recommending each Muslim to treat others as he likes to be treated by them. These rules are ideological. They deal with the internal believes of a person and reflect the principle of good faith in making transactions.[86] The implementation of these rules supposes the existence of the reasonable belief of a person, in addition to the fair construction of the Islamic society. Islamic *Fiqh* constituted many legal provisions, which create the legal base to get over the use of unfair terms in market transactions. "*A private injury is tolerated in order to ward off a public injury, severe injury is removed by lesser injury, in the presence of two evils, the greater is avoided by the commission of the lesser, and repelling an evil is preferable to securing a benefit*", *El-majalla* code provides.[87] Based on these rules, Islamic state has a duty to protect four fundamental rights in respect of every individual; life, religion, the acquisition or the ownership of wealth and property and personal human honour or dignity.[88] In the field of market activities, this duty binds the Islamic state to establish and elaborate the effective system of *Hisbah*.[89]

The *Hisbah* is defined as a system that ensures the righteousness of conducts of individuals. It is an institution of checks and balances.[90] The Muslim Jurist, *Al-Mawardi*, explained it as *a system of "enjoying what is just and right if it is found to be neglected or disregarded, and to forbid what is unjust and indecent if it is found to be practiced"*.[91] The function of the *Hisbah* with regard to commerce is described as: *on the spot checking of weights and measures, quality of the commodities offered for sale, honesty in dealing and the observance of modesty and courtesy in salesmanship and in the general behaviour of the people*.[92] Thus, a great care was taken to see that merchants and sellers use proper weights and measures. The caliph *Khalifah Ali*, the fourth ruler after the prophet *Mohamed* (P.B.U.H),[93] was most particular to do so. He used to go around the market in order to examine the fair treatments of sellers. The functions of the (*Hisbah*) are to: protect the rules of Islam from being violated; protect the honour of the people; ensure public safety; and to maintain quality standards and fairness in market transactions.[94] The term *measures* is used above as a target of the functions of the *Hisbah*. According to Muslim jurists, this term includes the specifications of the offered products, the prices of products and the *impartiality* of market transactions.[95] The last element refers to the fairness of these transactions, where the interests of the contracting parties have to be acquired equally via the terms of the agreement.[96] This reading is basically based on the terms of the letter of the caliph *Ali* to the governor (*El-Ashter*

El-Nakee) instructing him how to deal with the behaviours of traders that may contradict Islamic rules. He said that; *strictly address the greed of traders, their monopoly, anti-comparative actions and their control of market transactions*. *These actions have bad effects and disadvantages to the detriment of the interests of the society and individuals*. *Prevent the monopoly, because prophet Mohamed recommended so, rule the fairness of market transactions, do not prejudice the rights of the seller and the buyer, and punish the party who breaches these instructions without injustice or exceeding*.[97]

5 The tools of control of the use of unfair terms in market transactions

According to the EU Proposal, unfairness in consumer contracts may occur for two reasons:

a a consumer does not carefully read the contract term, because it is drafted in unclear or ambiguous language, so he cannot evaluate its legal impacts and consequences

b the seller or the supplier abuses his power, by contracting in a bad faith manner with the consumer, so the significant imbalance of rights and obligations to the detriment of the consumer appears.

These two reasons are the legal bases, which the proposal determined in order to rule out the use of unfair terms. The first reason is considered in article (31) of this proposal, which provides that in case of written contracts, contract terms must always be drafted in plain and intelligible language (transparent language). The second reason is considered in article (32) which stipulates that 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. In addition, the proposal provides two Annex of terms; black and an indicative list of terms. The first list (Annex 2) contains five terms which are in all circumstances considered unfair. (Annex 3) contains 12 terms which are presumed to be unfair. These lists aim to facilitate and unify the application of the principle of good faith between the European member states. They also aim to provide both sellers and consumers with contract terms that are, or may be, prohibited. Thus, the lists, according to the ECJ can be considered as a source of information for consumers when making market transactions.

5.1 The principle of transparency

This principle is provided as a legislative control for written consumer contracts in article (31) of the EU Proposal.[98] Pursuant to this article, contract terms that are offered to the consumer in writing must be in plain and intelligible language. In case of doubt, the interpretation most favourable to the consumer shall prevail. The sanction of the violation of this principle is mentioned in recital (20) of the Directive which provides that unclear contract terms are considered as not incorporated into the contract. In other words, the term in question does not bind the consumer, while the contract, in all, remains in force, if possible.

5.1.1 The criteria of the principle of transparency

The importance of this principle is mentioned in article (31) of the EU Proposal, para. 2, as: "contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract".[99] Mandatory requirements of clarity and transparency of standard form contracts is an important device to reduce the costs of searching for and negotiating more favourable terms. To interpret an ambiguous term in the most favourable way to the other party is to set a powerful incentive for the seller or supplier to draft his terms in a clear and transparent fashion.[100] The lack of transparency prevents the consumer from comparing different offers, being clearly informed of his legal position and from realising how much he is concretely paying for a certain service even though the relevant terms in themselves cannot be criticised.[101]

In this context, the proposal does not provide details regarding the best practices of the application of this principle. It authorises the European member states to choose the way to attain these objectives. It only mentions the importance of providing consumers with contract terms, in case of written terms, that must be drafted in plain and intelligible language. It also provides the consumer the right to be given the opportunity to examine all contract terms that he receives. In this regard, the best practice of the application of this principle, according to some of the member states' legal systems, can be deduced as follows:[102]

1 Consumers must be capable of understanding contract terms without resort to legal advice.

2 The duty of the seller, when using SFC, is not limited only to allowing the consumer the opportunity of becoming familiar with all contract terms. He has an obligation to inform the consumer with the use of standard terms.[103]

3 Contract terms have to be incorporated into the contract.[104]

4 The assessment of this principle (transparency) has to consider all other incorporated contract terms.

5.1.2 The clarity of contract terms

The conditions of the transparency and the clarity of contract terms are stressed in Islamic law. Muslims are required to make their transactions absolutely free from ambiguity.[105] They are required to be clear, honest, and just in their treatments to protect the contracting parties from mutual injustice and resulting disputes.[106] Thus, Islamic law requires contract terms to be drafted in plain and intelligible language *Sighah*. It also requires the certainty of making rights and obligations (the prohibition of probability agreement).[107]

Some Arabic provisions, in the field of consumer protection, pay attention to this criterion. For instance, these legal systems mention the consumer right to be protected by ensuring the transparency of the economic transactions to which the consumer is a party.[108] The consumer's right to access correct information about the products which he purchases or uses, so that he can exercise his right to choose from among all goods and services is stipulated in Egypt (Art. 2/b), Palestine (Art. 3/2), Syria (Art. 2/c), Iraq (Art. 6) and Lebanon (Art. 3). These objectives and rights ca not be attained without

drafting clear contract terms. For this reason, the condition of drafting consumer contracts in *Arabic* language in *plain and intelligible* words is provided in Egypt (Art. 3), Syria (Art. 34), Lebanon (Art. 19), Palestine (Art. 24/1) and Qatar (Art. 17).[109] The problem of this organisation is that, it does not constitute legal sanctions when these rules are violated.[110]

5.1.3 The incorporation of contract terms

This criterion enables the contracting party to get an access to all contract terms that may bind him.[111] This case includes the scenario of using non-incorporated contract terms, and the scenario of using advertised and declared terms. The theory of contract in Islamic law does not address these cases. It provides the right of the purchaser to rescind the agreement where he did not investigate, see or check *the object* of the agreement (the sold product).[112] This right is organised under the name of (options), which includes the option of condition, description, payment, selection, inspection and defect.[113] These options empower the aggrieved party rescinding the contract in all, and they do not extend to include the content and the formula of the contract terms itself.[114] Most of Arab regulations do not refer directly to this condition. Only article 19 of the Lebanese law refers to some conditions of consumer contracts, including the importance to not remit to other documents or conditions that are not allowed to the consumer to investigate and read. Otherwise, there are some indirect rules in some regulations referring to the application of this principle. For instance, the consumer right to receive *a fair treatment without discrimination* by the supplier, in addition to his right to *get an access* to correct information enabling him to compare and choose between the offered goods and services are provided in Palestine (Art.24/1/b) and Lebanon (Art. 3).[115] The problem of not constituting a clear sanction, regarding the breaching of this rule, is the same.[116]

5.1.4 The duty of the seller to inform

This criterion has an important role to make the contracting parties be in an equal position regarding their awareness of the object, the conditions, the advantages and the disadvantages of the agreement. Therefore, each of them can create and express his will fairly through the conditions of the agreement (conscious will). For this reason, this duty is provided in the first article of the French consumer code, which stipulates that *all business suppliers of goods or services must, prior to conclusion of the contract, ensure that the consumer is made aware of the essential characteristics of the goods or services*.[117] This provision refers to the obligation of the contracting party to supply the counter with all data and information, *which the later is not aware of*, in order to enable him creating fair and conscious will.[118] It is so called the duty to inform; the duty to notice; or the duty to insight.[119] The application of this duty is limited to data and information that are not realised or understood to the other party, and affect his decision when making the agreement.

Scholars in the Arab world define this duty as the duty of the contracting party to disclose all facts and data of the agreement to the counter party before making the agreement. It enables the counter party creating an insightful and conscious will before signing the agreement.[120] This definition reflects some characteristics of this obligation, namely:

1 This obligation may interact with the principle of good faith, where it derives its legitimacy from the principles of honesty and truthfulness of treatments.

2 This duty is not a contractual obligation because it rises before making the agreement. It can be considered as a regulatory obligation, and therefore, it requires a legislative action to be regulated.

3 This duty is a common obligation, so it does not deal with a specific contract or transaction.

4 It has a preventive function seeking to put the contracting parties in a similar position before making the agreement.

The best practice of this duty makes the seller be obliged to disclose all data and facts which may influence the decision of the counter party.[121] The organisation of this duty in the traditions of the Islamic law seems partial, and does not comply with the above explanation. These traditions provide the duty of the seller to inform the counter party before making the agreement, but it only deals with the object of the contract without referring to the uncore contract terms.[122] In this context, the holy *Qura'n* provides that "*O ye who believe! Eat not up your property among yourselves in vanities, But let there be amongst you traffic and trade by mutual good-will*".[123] In addition, the prophet *Mohamed* (P.B.U.H) mentioned the obligation of the seller to disclose *the defects of the sold thing* where they exist. For this reason, these rules need to be promoted in order to ensure the conditions and requirements of the best practice of this duty.[124]

Consumer protection laws in Arab states do not pay attention to this right. Only in Syria, article (32) obliges the seller to inform the consumer with all *fundamental characteristics dealing with the service that he provides*. The application of this obligation is in line with the Islamic approach which is mentioned above. In short, the above means that the duty of the seller to inform has to be provided in details in Arab legal systems to meet the requirements of its best practice. This organisation must explicitly constitute this duty, extends its application to include both of core and uncore contract terms and creates a clear sanction regarding the breaching of this duty (annul and invalidate the term in question).

5.2 The principle of good faith

The proposal considers a term to be unfair if, *contrary to the requirement of good faith, causes a significant imbalance* in the parties' rights and obligations arising under the contract to the detriment of the consumer (article 33 of the proposal and 3/1 of the Directive). In this case, the term in question does not bind the consumer (article 37 of the proposal and 6/1 of the Directive). In assessing the principle of good faith, *the bargaining position* of the contracting parties must be considered.[125] This position puts into consideration whether the consumer was induced, in bad faith, to agree on the term in question, and whether goods or services were sold or supplied to the special order of the consumer.[126] The seller or supplier can satisfy the requirements of good faith by dealing with the consumer *equitably*. This can be done by respecting *the legitimate interests and expectations* of the consumer (recital 16 of the Directive).[127] This requires that the *legitimate expectation* of the contracting parties has to be considered when applying this principle. This expectation can be reached by testing *the legal balance* of

the rights and obligations of the contracting parties arising under the agreement (the substantive base of good faith);[128] contract terms must be presented to consumers fairly; reasonably transparent; and do not operate so as to defeat the reasonable expectations of the consumer (the procedural base of good faith) or the pre-contractual good faith; the evaluation of this principle must take into consideration: the nature of the goods or services of the contract; the circumstances in which the contract was concluded; the whole contract terms; and other contracts which are linked with the agreement in question (article 32/2 of the proposal and 4/1 of the Directive).[129]

5.2.1 The pre-contractual good faith

This element refers to the fair positions of the contracting parties before signing the agreement. It deals with the circumstances of making the agreement and how the contract terms are presented to a consumer.[130] It refers to the balance between the contracting parties before making the agreement by making sure that the contracting parties are in the same, or similar, position regarding their awareness of all data and information of the agreement. The assessment of this base includes verifying the following:[131] the opportunity of the consumer to influence the terms of the agreement; the ability of the consumer to exercise any choice in agreeing to the offered terms or alternatives; the consumer right to receive contract terms in clear and intelligible language (the condition of transparency); and the ability of the consumer to understand the meaning and the consequences of the contract terms that he receives. Thus, a term would be contrary to good faith if it surprises the consumer, and this base addresses the consumer right of information that enables him to get the appropriate decision. This enables the consumer to influence the terms of the agreement at the time of negotiation.

5.2.2 The substantive good faith

This element deals with the term in question directly, and involves the evaluation of the interests of the contracting parties.[132] It focuses on whether and to what extent a term in question considers and pays attention to the interests of the consumer. A term may simply be unfair if its consequences create a significant unbalance of rights and obligations between the contracting parties.[133] This addresses the impacts of the contract term in question, and focuses on to what extent this term can be relied on to attain the consumer interests. It also tests whether the term may be reasonable and acceptable for the seller in case of he is asked to be bound by its consequence (be in place of the consumer).[134] Based on this, the principle of good faith extends to include some forms of excluding liabilities, which create a status of unbalance between the contracting parties, in addition to all cases where one party abuses his powers.

5.2.3 The principle of good faith in Arab legal systems

Arab legislators did not realise the role of this principle for getting over the use of unfair terms in market transactions. Only the Lebanon legislator, indirectly, follows a positive approach in this matter. The Lebanon legislator adopted, to some extent, a similar approach to the European Directive when he:

1 constituted a definition of unfair term as the term that creates a significant imbalance of rights and obligations between the contracting parties to the detriment of the consumer

2 annulled this term where it is used in consumer contracts either it is individually negotiated or not (the German approach)

3 excluded the term of price from this control

4 paid attention to the date of contracting and all other contract terms when evaluating the notion of the term in question (article 26).

In addition, the Lebanon legislator provided a black and non-exclusive list of terms that may be regarded as unfair (The Belgian approach). This list is partial, and contains only ten terms. Otherwise, consumer protection laws in other Arab legal systems do not mention this principle as a tool to get over the use of unfair terms.

5.2.4 The principle of good faith in Islamic law

In Islamic history, trade has been encouraged since the beginning of Islam. *Mecca*, the holy city of Muslims, was renowned as a commercial centre. The activities of trade and commerce, which were encouraged, were strictly based on the rules of honesty, fairness, and good faith. Islamic law underlines that trade should always ensure a fair exchange of benefits as profits without imposing any unlawful pressure on another party or, indeed, without committing a fraud. For this reason, the pre-contractual good faith and the substantive base of good faith exist in the rules of Islamic *Fiqh*.

5.2.5 The procedure pre-contractual good faith in Islamic law

Many guidelines reflect the application of this base as follows: First, the *Qura'n* instructs Muslims to prove and verify any given statement or information before making a decision or taking any action. It advises them to investigate the status of the product and the conditions of the agreement before making purchasing. This obligation begins with the duty of the contracting party to ascertain whether the purchased product is permissible (*halal*) or not permissible (*haram*), and ends with the duty of the contracting party to examine the terms and the conditions that he agrees on.[135] Second, Islamic rules prohibit all kinds of fraudulent transactions whether before making the transaction or at the time of performing the obligations of the contracting parties. The following *Hadith*, the prophet *Mohamed* (PBUH) exemplifies how the contracting parties are bound to deal together honestly when making the agreement.[136] *The prophet Mohamed (PBUH) happened to pass by a heap of eatables (corn). He thrust his hand in that heap, and his fingers were moistened. He asked the owner of the heap of eatable (corn) 'what is this? These have been drenched rainfall", the owner replied. He (the prophet) remarked "why did not you place this drenched part of the heap over other eatables, so that people could see it? He who deceives is not my follower*. A similar situation took place when the second caliph (*Khalifq*), (*Umar Ibn Al Khattab*), punished a man who was selling milk that was diluted with water. He did so not because the milk was unfit for drinking, but rather because *the buyer would not know the relative quantities of milk and water before making the agreement*.[137] Hence, Islam urges Muslim businessmen to be honest and not to mislead the purchaser by using fraudulent actions.[138] Third, the obligation to ensure

that all contracting parties are aware of what they agree on is considered in Islamic law too. An early example can be seen in the opinion that was given by *Shatibi*.[139] The owner of goods handed his merchandise to an agent with an agreement to sell them with a suggested price. The agent approached a buyer, who offered a different price, then the agent informed the owner, and the latter agreed on that price. The agent, however, asked the buyer to raise the price, to which they agreed before, and the buyer agreed to raise the price. Thus, the agent sold the merchandise for more than the price that was agreed on between him and the owner. *Shatibi* was asked if such a sale contract was valid. He responded that, since the offer and acceptance had been fulfilled, the contract was valid. As to the question of the agent charging of the price higher than the one that was consented by the owner, *Shatibi* said that, this fact may invalidate the contract, because the acceptance of the owner to sell at the particular price was commonly understood as "*sell it at this price if there is not a higher offer*", not as "*sell it at this price only and do not accept higher offers*".[140] Fourth, Islamic law provides many forms of contracts, which their legal formation depends on the fair dealing of the contracting parties, and therefore, their internal behaviours and intentions. These kinds of contracts are so-called the contracts of honesty '*Aqd EL Amana*'.[141] In these contracts, the provided conditions of the agreement depend on specific information and data that the seller is aware of. The acceptance of a consumer is based on the information that he receives from the seller, or he trusts that the seller will constitute the conditions of the agreement honestly.

5.2.6 The substantive good faith in Islamic law

This principle of good faith refers to the balance of rights and obligations between the contracting parties at the time of the performance of the contract. Islamic rules pay reasonable attention to balance between people, because it (balance) is a main indicator that mirrors fairness and justice of transactions and behaviours. For this reason, the holy *Qura'n* describes the Muslim nation as a moderate nation, and this balance was the main rule that the creation of this world based on. The holy *Qur'an* stipulates that, "*thus, have we made of you an Umma nation justly balanced*.[142] *And the Firmament has He God raised high, and He has set up the Balance of Justice*;[143] *in order that ye may not transgress (due) balance*".[144] The balancing principle in the *Qur'an* is that "*those who, when they spend, are not extravagant and not niggardly, but hold a just (balance) between those (extremes)*".[145] This makes the implementation of this balance be more comprehensive than many legal systems that require this balance to be between persons. In addition, Islamic rules do not only deal with the action itself to determine this balance. They pay attention to the consequences of using this action that may create this unbalance where the action itself does not appear so.[146] In this context, there are many guidelines of the theory of the substantive base of good faith either in *Qura'n* or in *Sonah*. The classic Islam jurists also apply this theory in many cases.[147] From these guidelines, the following two rules can be deduced, namely:

a the disproportion between the contradictable interests

b the prohibition of the probability agreements.

The first case occurs where the imbalance between the interests of the holder of the right and the damages of the encounter party significantly exists.[148] Islamic rules deal with this imbalance through the rule which provides that *repelling an evil is preferable to securing*

a benefit. This rule can be understood as the use of contract terms which create an advantage to one contracting party and at the same time cause a significant damage for the other party is forbidden. This case may also occur where the imbalance between the damages that happen to the contracting parties, due to practicing a specific action, is significantly present.[149] To deal with this case, Islamic rules provide that *severe injury is removed by lesser injury*. In consumer contracts, the loss of the seller because of not using the unfair term may be less than the loss of the consumer if the same term is used. Thus, the use of this provision may get over the imbalance of rights and obligations between the contracting parties.[150] The second case takes place because Islamic rules prohibit transactions where they depend on chance and speculation, where the rights of the contracting parties are not clearly defined and when someone is able to accumulate wealth at the expenses of others.[151] Therefore, a contract which does not precisely define its consequences between its parties is forbidden in Islamic law.[152] According to the *Hanafi* school, some forms of sale which may have uncertain outcomes are prohibited.[153] The sale of a non-existing thing is void. For instance, the sale of the fruit of a tree which has not yet appeared is void. In contrast, the sale of fruit which is completely visible while on a tree is valid whether it is fit for consumption or not. The sale of a thing which is not capable of being delivered is void. For instance, the sale of a sunken boat that cannot be raised, or of a runaway animal that cannot be caught and delivered is void. The sale of a thing which is not generally recognised as a property or the purchase of a property therewith is void. For instance, the sale of a corpse is void. The sale of a thing of unknown nature is voidable. For instance, a vendor tells a purchaser that he has sold him the whole of the property that he owns for a certain sum of money, and the purchaser states that he has bought the same.

5.3 The list of unfair terms

5.3.1 The European approach

To facilitate and unify the application of the test of good faith between the European member states, the Annexes of the EU Proposal provide two lists of terms (black and grey) reflecting the common use of unfair terms in market transactions. The black list refers to terms which are necessarily considered as unfair. If the term in question is a typical instance in relation to the terms which are contained in the black list, it has to be considered as unfair. The grey one refers to a list of terms that can quite simply be considered as unfair, but which on the basis of an examination of the actual instant may also prove not to be unfair.[154] The Directive provides only an indicative list, which is divided into two parts: the first part is an indicative and non-exhaustive list containing 17 different types of terms that may be regarded as unfair if they have certain objects or effects; the second one is a list of five exceptions of the first list. This list, in general, has an indicative value.[155] These lists provide the common used contract terms in market transactions, which create a significant imbalance in rights and obligations between the contracting parties. They aim to: harmonise the implementation of the principle of good faith between the MS,[156] help the national courts to interpret the general criteria of fairness which are provided in the proposal and the Directive, and supply all parties (including: national courts, other competent bodies, affected groups, individual consumers and sellers and suppliers) with criteria that may help to interpret the conception of unfairness.[157]

5.3.2 The approach of Arab legal systems

As explained above, only the Lebanon consumer protection law stipulates a list of ten unfair terms. In both of the letters and the spirit of the regulation, the list is undoubtedly a black one. Article (26) of this legislation uses the expression, *I translate*, (*the following terms, for example and non-exclusively, are unfair*). It contains an illustrative collection of terms that are unfair. This sentence has an important meaning when researching the legal nature of the list. On one hand, the list is representative as it reproduces the most typical and common unfair terms. Therefore, terms which are not mentioned in the list may also be considered as unfair in specific cases. It will be for the national court or the authorised administrative bodies, considering all the relevant factors in the individual case, to ascertain whether the term in question is also unfair de facto. On the other hand, the appearance of a term in this list means it is unfair. In short, if the term falls within this list, it is, without doubt, unfair. If the term falls outside the list, this does not preclude the national judge to decide that it is unfair, where it creates a significant imbalance to the detriment of the consumer.

Contrary to the above, other legal systems do not constitute any list. For the historical approach, some parties in some Arab countries recommended constituting an indicative list in the proposed legislation, but the legislator rejected these recommendations. For instance, in Palestine, Many parties proposed providing an indicative list of terms in consumer protection law, but this approach was ignored.[158] The Palestinian legislator followed the recommendation of the government, which proposed the following: *I translate*, "*it is not acceptable for the law to constitute these technical and legal details, which may deal with the contract terms that are used in market transactions. The law has to constitute the general frame of consumer protection, and these details may be determined and provided by the (PCPC). It will be easy for the specific executive departments, which deal with the needs of consumers, to evaluate and address these technical details*".[159]

6 Conclusions

The evaluation of consumer protection laws in Arab legal systems reveals the absence of consumer protection where unfair terms are used in consumer transactions. Only the Lebanon consumer law deals positively with this issue. The Lebanese measures are similar to the European measures.

What the Lebanese law needs to do is to create a clear legal sanction where the term is not provided to the consumer in a clear manner, by annulling this term clearly to make it do not bind the consumer.

In contrast, all other consumer protection laws in Arab Legal systems do not constitute specific and direct rules to protect consumers against unfair terms in market transactions. It would be better for those legal systems to benefit from European insight. These laws announce a comprehensive list of rights for consumers, corresponding with those rights that are declared by the European community, including the consumer right to receive fair treatments when making market transactions (the impartiality of economic transactions). These rights are also provided in Islamic law, where the balance of legal transactions must be considered in order to comply with the main message of Islam (justice between all people). The system of *Hisbah* was used in order to check the used

weights and measures in the market, and to monitor the fairness of market transactions too.

To overcome the use of unfair terms, the European legislator provided the principles of transparency and good faith.

First, the principle of transparency requires written contract terms have to be presented to the consumer in clear and intelligible language. This principle makes the contracting parties be aware of the contract terms that they agree on before making the agreement. The best practice of this principle requires three bases. The first base deals with the ability of the contracting parties to read and understand the terms of the agreement, so these terms have to be drafted in clear and intangible manner (the clarity of the contract terms). The second base allows the contracting party to get an access to all of contract terms (incorporated in the contract terms). The third base of this principle addresses the duty of the seller to inform the consumer with all data and information dealing with the consequences of the contract terms, which may not be understood by the consumer. These bases are not fully determined in Arab legal systems. The first two bases are considered in some laws, which provide them clearly in many articles. The problem of this organisation is that it does not constitute clear sanctions regarding the breaching of these two bases. *Therefore, it is recommended that contractual terms which do not comply with the two bases be declared null and void*. The application of third base is limited to data that deals with the object of the agreement. Therefore, the seller is not obliged to inform the other party with the impacts and the consequences of the rights and the obligations that are provided by the agreement. Besides, the legal sanction of the breaching of this duty is not provided too, so the application of this duty may be totally damaged. *It is recommended to constitute clearly the seller's obligation to inform, and provide a clear sanction saying that, the term in question is null and void if it is not transparent.*

Second, the principle of good faith in not provided in the consumer protection laws of the Arab legal systems. The procedure base of good faith includes: the obligation of the contracting party to investigate and inspect the terms of the agreement before making it, the prohibition of all kinds of fraudulent transactions and the obligation of the contracting party to ensure that the other party is aware of what he agrees on. The contracts of honesty (*Amana*), which are provided by the terms of *El-Majalla* code, reflect a form of this principle, where the seller is obliged by disclosing all data and information dealing with the terms of the agreement to the other party. The substantive base of good faith indicates the balance of rights and obligations of the contracting parties. In Islamic law, the disproportion between the contradictable interests, which may create this imbalance, and the prohibition of the probability agreements, which do not accurately determine the rights and obligations of the contracting parties, are main two rules that reflect the application of this base. *It is recommended that Arab countries amend the provisions of these laws, constitute the application of this principle obviously, and annul the term in question where it creates a significant imbalance of rights and obligations to the detriment of the consumer. In addition, the two lists of the proposal are recommended to be transposed into these laws in order to facilitate the application of this principle.*

Notes

1 The law no. (659) that was enacted on 4/2/2005.

2 The law no. 21/2005 that was enacted on 27/5/2005, which is published in the Palestine Gazette (Palestinian National Authority), issue No. 63 at 27/04/2006, p.29.

3 The law no. 67/2006.

4 Law no. 24/2006 of consumer protection in United Arab Emirates, issued on 13/8/2006 and is published in Arabic language on the following link: http://www.shjmun.gov.ae/v2/arabic/docs/rule.pdf (accessed on 23/12/2008).

5 The law no. 8/2008 that was enacted on 15/5/2008.

6 The law no. 2/2008 that was enacted on 6/3/2008.

7 The law no. 1/2010 that was enacted on 4/1/2010.

8 The draft of consumer protection in Jordan in 2006, published on the following link:

http://www.mit.gov.jo/portals/0/tabid/550/%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%AD%D9%85%D8%A7%D9%8A%D8%A9%20%D8%A7%D9%84%D9%85%D8%B3%D8%AA%D9%87%D9%84%D9%83.aspx (accessed on 19/12/2008).

9 The law no. 117/1992 that was enacted on 7/12/1992.

10 See, for instance, articles (15), (16), (17), (18), (21), and (22) of the (CPL); see also articles (41:51) of the proposed bylaw of the (CPL).

11 See, for instance, articles (19) and (20) of the (CPL), and article (56) of the proposed bylaw of the (CPL)

12 See, for instance, articles (7:14) of the (CPL), and articles (25:36) of the bylaw of the (CPL)

13 For more details about the legal base of unfair terms in Islamic law and the position of Islamic law in some Arab countries, see Fayad, M. (2010) 'The legislative consumer protection of the use of unfair terms in Palestine, a comparative legal study with the European Directive (93/13/EEC) of unfair terms in consumer contracts, PhD thesis, VUB University.

14 'The council directive of April, 5 1993, on unfair terms in consumer contracts', *O.J. L 095, 21/04/1993, pp.29–34*.

15 F Poll, 'Unfair terms in the acquis principles and draft common frame of reference: a study of the differences between the two closest members of one family', available at: http://www.juridica.ee/print_article_et.php?document=en/international/2008/1/144780.ART.7.pub.php (accessed on 22/4/2010)

16 These directives are: the directive (85/577/EEC) on contracts negotiated away from business premises; the directive (93/13) on unfair terms in consumer contracts; the directive (97/7/EC) on distance contracts; and the directive (1999/44/EC) on consumer sales and guarantees.

17 The differences between this proposal and the directive do not serve the objectives of this article, so they will not be mentioned here These differences are: (1) the proposal adopts the maximum harmonisation technique while the directive adopts the minimum one; (2) the proposal constitutes two lists of terms (an indicative and black list), while the directive adopts only the indicative list.

18 This is a part of the so-called as the regulatory impact assessment (RIA). For more details about these rules, see Kirkpatrick and D. Parker, *Regulatory Impact Assessment and Regulatory Governance in Developing Countries*, a paper has been prepared as part of the Regulation Research Programmed in the Centre on Regulation and Competition at the Institute for Development Policy and Management, University of Manchester and at Cranfield University in 2004, p.333, available at http://iatools.jrc.ec.europa.eu/public/IQTool/ResearchImpactAssessment/RIAReg.gov.in.develop.countries.2004.pdf (accessed on 16/2/2009.

19 Article (103) of *El-Majalla* code. It is the civil code, which dates back to (1876) and is derived from the rules of Islamic law. It is still applied in some Arab countries like Jordan and Palestine. The formal translation of the terms of *El-Majalla* code to the English language is available at http://www.iiu.edu.my/deed/lawbase/al_majalle/index.html (accessed on 22/12/2006), translated by the ministry of Justice of Malaysia.

20 Abou El-basal, A. (1999) *The Legal Theory of Contract in the Jordanian Civil Law,* El-Nafaise Publisher, Amman Vol. 104; Oehadee, D. (1989) *The Sale of Contract in the Palestinian Legal System, Comparative Study* (without publisher: Gaza) Vol. 36.

21 Nebbia, P. (2007) *Unfair Contract Terms in EC Law*, Hart Publications, London, Vol. 9; James, N.J. (2001) *Do Not Blame Me, When Declaimers Work and When They Don't*, Law Lecturer, University of Queensland Business School Publications 7; E. Hondius (1994) *EC Directive on Unfair Terms in Consumer Contract*, *Journal of Contract Law*, Vol. 7, p.34.

22 See A. Abou El-Lal (1995) 'The principle of freedom of contract, its scope and content, legal analysis to the role of the will in contracting', *The Kuwait Bar Association Journal*, Vol. 19, pp.10–11.

23 The Directive (93/13) provides the same definition in its article (2/b).

24 *Cape Snc v Idealservice Srl; Idealservice MN RE Sas v OMAI Srl* (C-541/99 & 542/99) (2001) E.C.R. I-9049; (2003) 1 C.M.L.R. 42 at [15] *et seq*.

25 Nebbia, P. (2007) *Unfair Contract Terms in EC Law*, Hart Publications: London, Vol. 72; Parr, N. (1993) 'The relevance of consumer brands and advertising in competition inquiries' 14–4 *European Commercial law Review*, p.159; Dobson, P.W. (2007) 'Differential buyer power and the waterbed effect: do strong buyers benefit or harm consumers?', 28–7 *European Competition Law Review*, p.393.

26 The Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p.31).

27 ECJ 45/96 (1998) E.C.R. I-1199.

28 See Para 18; 19; 20; and 23 of this case.

29 Heiderhoff, B. (2007) 'The Commission's 2007 green paper on the consumer acquis: deliberate deliberation?', 32–5 *European Law Review* 740; Evans (2007) 'Assessing consumer detriment Phil Evans, 28–1 *European Competition Law Review* 26; Nebbia, P. (2007) *Unfair Contract Terms in EC Law*, Hart Publications, London, 75, see also the conception of the weak party in chapter one of this study.

30 Dobson, P.W. (2007) 'Differential buyer power and the waterbed effect: do strong buyers benefit or harm consumers?', 28–7 *European Competition Law Review* 393; Incardona, R. (2005) 'The Corte di Cassazione takes 'Courage'. A recent ruling opens limited rights for consumer in competition cases', 26–8 *European Competition Law Review* 445.

31 In these legal systems, a consumer is defined as the person *who* gets goods or services *to consume* his personal needs or the needs of others. Thus, a consumer is *a physical person* who makes legal transactions not concerning to his main commercial activities.

32 See Fayad, M. (2010) 'The legislative consumer protection of the use of unfair terms in Palestine, a comparative legal study with the European Directive (93/13/EEC) of unfair terms in consumer contracts', PhD thesis, VUB University, p.398:402.

33 See Salem, S. (1998) 'Consumer protection in Islamic Fiqh between policies and practices', *Islamic Legal Studies* 18.

34 See unpublished report of the seminar titled '*Quality standards and consumer concerns*' that is organized by the consumer rights commission of Pakistan on 14 October 1999 in Islamabad, Pakistan; Abd-El-Bakee, O (2004) *The Contractual Protection for Consumer*, El-Maaref Institution for Publishing: Alexandria, 34; A Abd El-Khaleq, *The Law of Consumer Protection in Arab countries*, unpublished paper that was presented to a legal conference that was held in Masqat, Oman, April 2001.

35 Way of *Allah* refers to charity and spending on the poor. In Quran *Allah* Said that: those who spend their substance in the cause of Allah, and follow not up their gifts with reminders of their generosity or with injury, for them their reward is with their Lord; on them shall be no fear, nor shall they grieve (2:262); those who (in charity) spend of their goods by night and by day, in secret and in public, have their reward with their Lord: on them shall be no fear, nor shall they grieve (2:274); alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to the truth);

for those in bondage and in debt; in the cause of Allah; and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom (9:60).

36 Salem, S. (1998) 'Consumer protection in Islamic Fiqh between policies and practices', *Islamic Legal Studies* 23.

37 Unpublished report of the seminar titled '*Quality standards and consumer concerns*' that is organised by the consumer rights commission of Pakistan on 14 October 1999 in Islamabad, Pakistan.

38 Rafik, I.B. (1997) 'Islamic business ethics', 2; The International Institute of Islamic Thought; Salem, S. (1998) 'Consumer protection in Islamic Fiqh between policies and practices', *Islamic Legal Studies* 22.

39 For more details about the theory of consumption in Islam, see Henne, A. (1995) 'The behavior of the consumer in Islamic economics', *Journal of Distortion and Economy of the Mostanserea University* 123; Shaowkey, D. (1984) 'The economic theory in Islam', El-Khoramee Publisher, the Riyadh, 96; Bandalee, K. (1982) 'The believe and the society of consumption', El-Noor Publications, Beirut, 12; Nakkas (1989) 'Consumer protection and its impact on the general theory of contract in the Kuwaiti civil code', *The Kuwaiti Journal of Law* 46; Abou-El-lal, I. (1985) 'Backing in contracting, a comparative study between Sharia and law', *Kuwait Bar Association Journal* 14; Ahmed, M. (1992) *Consumer Protection in Islamic (Fiqh)* (El-Azhar University Publications: Cairo) 118.

40 See Sarwar, K.M. and Hafeez, A. (2000) 'Consumer laws in Pakistan, a ready reference for consumer and practicing lawyers', unpublished paper that is presented in (2000) to the consumer rights commission of Pakistan, p.2.

41 Salem, S. (1998) 'Consumer protection in Islamic Fiqh between policies and practices', *Islamic Legal Studies* 19; Abd El-Khaleq, A. *The Law of Consumer Protection In Arab Countries*, unpublished paper that was presented to a legal conference that was held in Masqat, Oman, April 2001, p.4; K.M. Sarwar and A. Hafeez, *Consumer Laws in Pakistan, A Ready Reference For Consumer And Practicing Lawyers*, unpublished paper that is presented in (2000) to the consumer rights commission of Pakistan, p.3; M. Ahmed, *Consumer Protection in Islamic (Fiqh)* (El-Azhar University Publications: Cairo 1992) 27; H. Rahman, *The General Directions of Protecting Consumers*, unpublished paper introduced to the conference of consumer protection in law and Islamic Sharia, held in the faculty of law, Ain Shams university, 29 April 1995, p.41.

42 The definition of *riba* in classical Islamic jurisprudence was 'surplus value without counterpart'. or 'to ensure equivalency in real value' and that 'numerical value was immaterial'.

43 Abd-El-Bakee, O. (204) *The Contractual Protection for Consumer*, El-Maaref Institution for Publishing, Alexandria, 401; Refaee, A. (1994) *The Civil Protection for Consumers in Contract Law*, Dar El-Nahda El-Arabia, Cairo, 211.

44 Law on Protection and Information for Consumers (so-called '*loi scrivener*') Amended by the Act of 6 August 2004 relating to the protection of individuals with regard to the processing of personal data, available on the following link: http://www.cnil.fr/fileadmin/documents/uk/78-17VA.pdf (accessed on 16/6/2007).

45 Bandaree, M. (1998) *Consumer Protection In Adhesion Contracts*, a published paper in the conference of Consumer Protection in Islamic *Sharia* and law, held in the faculty of *Sharia* and law, United Arab Emirates, December 1998.

46 The Egyptian Cassation Court decision No. 50, 11 k, 21 April 1960.

47 Unfair terms in Consumer contracts and an appropriate method of control, Resolution No. (47/76) that was adopted by the Committee of Ministers of the Council of Europe on 16 November 1976, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=592954&SecMode=1&DocId=655510&Usage=2 (accessed on 16/6/2007).

48 See also: Schillig, M. (2008) 'Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair

contract terms', 33–3 *European Law Review Journal* 339; Houndous, E. (1995) 'The reception of the directive on unfair terms in consumer contracts by member states', *European Review of Private Law*, Vol. 3, p.243.

49 This article stipulates that, the unfair tern is the term that creates an imbalance of rights and obligations between the contracting parties to the detriment of the consumer.

50 This definition is explained in chapter (2) of this thesis.

51 In France, and before the implementation of the Directive (93/13), this definition was based on the source of these terms (the economic abuse of power), and was developed to pay attention to the impact of these terms. According to article (35) of the law number (22/78) of 10 January (1978) this definition was stipulated as a term that is imposed upon consumers by the abuse of the economic power of traders. Recently, and according to the consumer code number (96/ 95) of 1 February 1995, which amended the above law, this definition is stipulated in article (L 132/1) of the code. According to this article, unfair terms are *terms that aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract*.
In the common law legal system, this definition is to some extent clear. Before adopting the Directive (93/13) in England, this definition was stipulated in article (17), section (3) of the (UCTA) that adopted the source and the impact bases. It is defined *as terms that used by a business in its written standard terms or in a contract with a consumer and that either purport to exclude or restrict the business liability for breach of contract*.

52 The (EC Court) decisions No. 592/ 55 k, 26 January 1989; 213/ 21 k, 10 March 1955; 563/ 34 k, 5-12-1968; See also the following link: http://www.mallesons.com/publications/competition/8066076w.htm (accessed on 31/112008).

53 The decision of the high court of appeal of Gaza strip No. 59/86, which is published in the Waleed El Haik Publications group, p.408; The Jordanian Cassation Court decision No. 3/71, the Journal of Jordanian Bar Association in 1971, p.182.

54 Ramsay, I. (2007) *Consumer Law and Policy: Text and Materials on Regulation Consumer Markets*, Hart Publishing, USA, 159; Trebilcock, M.J. (2003) *Rethinking Consumer Protection Policy in Rickett and Telfor, International Perspective on Consumer's Access to Justice*, Cambridge University Press, Cambridge, 93; Refaee, A. (1994) *The Civil Protection for Consumers in Contract Law*, Dar El-Nahda El-Arabia, Cairo, 217.

55 Cserne, P. (2001) 'Policy considerations in contract interpretation: the contra proferentem rule from a comparative and economic perspective', a paper to be presented at the *EALE Conference*, Copenhagen, 13–15 September 2007; James, N.J. (2001) *Do not Blame Me, When Declaimers Work And When They Don't*, Law Lecturer, University of Queensland Business School Publications 8; Hondius, E. (1998) 'Unfair terms in consumer contracts, towards a European Directive', *European Consumer Law Journal*, Vol. 3, p.181.

56 Salam, S. (1998) *The Contractual Balance In Adhesion Contracts, A Comparative Legal Study*, Dar El-Nahda El-Arabia, Cairo, 129.

57 Omran, M. (2003) 'The economic power in market transactions', *Social Sciences Journal*, Vol. 2, p.131.

58 Gorrie, A. (2006) Competition between branded and private label goods, do competition concerns arise when a customer is also a competitor?', 27–5 *European competition Law Review Journal*, 221.

59 Kessler, F. (1943) 'Contracts of adhesion – some thoughts about freedom of contract', *Columbia Law Review*, Vol. 43, p.629, 632, 640, mentioned in Schillig, M. (2008) 'Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms', 33–3 *European Law Review Journal*, 337.

60 ECJ (240 to C-244/98) (2000), E.C.R. I-4963; (2002) 1 *Common Market Law Review Journal* 43 at 25; ECJ168/05 (2006) E.C.R. I-10421, (2007) 1 *Common Market Law Review Journal* 22.

61 See Joerges, C. (1995) translated from Germany by L Fraser and P Wilkins, 'The Europeanization of private law as a rationalization process and the contest of disciplines – an analysis of the Directive on unfair terms in consumer contracts', *European Review of Private Law*, 179.

62 The ECJ 240/98 (2000) ECR I-4491.

63 See Abd El-All, M. (2007) *The Conception of the Weak Party in the Contracting Relation*, Dar El-Nahda El-Arabia, Cairo, 5.

64 The Jordanian Cassation Court decision No. 576/2007, Adalla Publication, on 15/7/2007, Para. 1.

65 The Jordanian Cassation Court decision No. 2541/1999, Adalla Publication, on 26/3/2000.

66 The Jordanian Cassation Court decision No. 2733/2004, Adalla Publication, on 12/12/2004.

67 Boree, A. (1998) *The Intermediary in the Social Law*, 1st Dar El-Nahda El-Arabia: Cairo, 183; Abou El-basal, A. (1999) *The Legal Theory of Contract in the Jordanian Civil Law*, El-Nafaise Publisher, Amman, 119; Far, A. (1998) *The Sources of Obligations in the Jordanian Civil Law*, El-Thaqafa Publisher, Amman, 71; Soltan, A. (1987) *The Resources of Obligations in the Jordanian Civil Law*, The Jordanian University Publications, Amman, 129.

68 See The Jordanian Cassation Court decisions No. 2541/1999, Adalla Publication, on 26/3/2000; 531/1998, Adalla Publication, on 13/5/1998; 2596/2001, Adalla Publication, on 31/7/2001; 1417/2001, Adalla Publication, on 7/10/2001; 2596/2001, Adalla Publication, on 31/7/2001; The (JC Court) decision No. 1417/2001, Adalla Publication, on 7/10/2001; Ramsay, I. (2007) *Consumer Law and Policy: Text and Materials on Regulation Consumer Markets*, Hart Publishing, USA, 159.

69 Ahoaee, H. (2000) *The General Theory of Obligation, The Administrative Resources*, Dar El-Nahda El-Arabia, Cairo, 386.

70 See article (100) of the Egyptian civil code; article (104) of the Jordanian civil code; and article (89) of the Palestinian draft of civil code. See also The Jordanian Cassation Court decisions No 576/2007, Adalla Publication, on 15/7/2007, Para. 1; 2157/2005, Adalla Publication on 21/11/2005, Para.1; 3589/2004, Adalla Publication, on 22/2/2005, Para. 1.

71 Refaee, A. (1994) *The Civil Protection for Consumers in Contract Law*, Dar El-Nahda El-Arabia, Cairo, 49.

72 Abd-El-Bakee, O. (2004) *The Contractual Protection for Consumer* (El-Maaref Institution for Publishing, Alexandria, 42.

73 See article (149) of the Egyptian civil code; article (204) of the Jordanian civil code and article (150) of the Palestinian draft of civil code. For more details see the explanation of article (15) of the in the explanatory mandatory of the Palestinian draft of civil code.

74 See Dosokee, M. (1985) *The Obligation to Inform Before Making the Contract* (Ehab Publications, Asuot, 21; Jmeiee, H. (1991) *The Impact of Imbalance Between the Contractor Upon the Contract Terms*, Dar El-Nahda El-Arabia, Cairo, 99.

75 Abd El-All, M. (2007) *The Conception of the Weak Party in the Contracting Relation*, Dar El-Nahda El-Arabia, Cairo, 47.

76 The objective impossibility occurs in contracts, which include an obligation of liability or guarantee upon their parties. This case may be clearly explained in the contracts of lease or sale. In these contracts, the buyer or the renter may not get enough access to the information of the object of the contract; because this object is held by the encounter party and under his control. Also, he may get information regarding this object at the time of negotiating the contract, and therefore he may lack enough time to make this investigation, and this makes his investigation be unintelligent and shallow. This status of weakness has many forms: (1) it may be done because of the ignorance of the legal position of the contract's object; (2) it may also occur because of the ignorance of the substantial description of the contract object, which the contractor depends on to make his decision; (3) in addition, this object may have a hidden defect, which the buyer cannot detect at the time of making the contract (as defects in the used

cars); (4) another form may be inserted here where the buyer ignores the way of using that object; especially in case of it is complicated in use.

77 Unpublished report of the seminar titled '*Quality standards and consumer concerns*' that is organised by the Consumer Rights Commission of Pakistan on 14 October 1999 in Islamabad, Pakistan.

78 Chapter (5) of Consumer Protection Law of Palestine; Chapter (5) of Consumer Protection Law in Syria; Chapter (1) of Consumer Protection Law in Tunisia.

79 Article (1) of Consumer Protection Law in Lebanon.

80 Article (1/1) of Consumer Protection Law of Palestine.

81 Articles (2/2) of Consumer Protection Law In Palestine; article (2-C) of Consumer Protection Law of Syria.

82 Articles (2/5) of Consumer Protection Law of Palestine.

83 Article (2-C) of Consumer Protection Law of Egypt; article (2-D) of Consumer Protection Law of Syria; article (3) of Consumer Protection Law of Qatar.

84 Article (2-B) of Consumer Protection Law of Egypt; Article (2-C) of Consumer Protection Law of Syria (2-C); Article (2) of Consumer Protection Law of Qatar.

85 Syria, article (4).

86 See unpublished report of the seminar titled '*Quality standards and consumer concerns*' that is organised by the Consumer Rights Commission of Pakistan on 14 October 1999 in Islamabad, Pakistan; Salem, S. (1998) 'Consumer protection in Islamic Fiqh between policies and practices', *Islamic Legal Studies* 21; Henne, A (1998) 'The principle of moderation in consumption', *Journal of Knowledge of the Baghdad University*, Vol. 1, p.207; Kantakgee, N. (2005) 'The conception of market in Islamic Fiqh', *The Journal of Law and Economy*, 5; Salah, N. (1991) *Consumer Protection in Jordanian Law, A Comparative Legal Study*, Dar Zahran, Amman, 46; Jmeiee, H. (1996) *Protecting the Consumer, the Private Protection for the Consumer Acceptance in Consumer Contracts*, Dar El-Nahda El-Arabia, Cairo, 119.

87 See articles (26; 27; 28; and 30) of *El-majalla* code.

88 See Sarwar, K.M. and Hafeez, A. (2000) 'Consumer laws in Pakistan, a ready reference for consumer and practicing lawyers', unpublished paper that is presented in Consumer Rights Commission of Pakistan.

89 Memon, M. (1985) 'Review of public duties in Islam: the institution of the Hisba. by Ibn Taymiya', *International Journal of Middle East Studies*, Vol. 17, 141; Henne, A. (1998) 'The principle of moderation in consumption', *The Journal of knowledge of the Baghdad University*, Vol. 1, p.201.

90 The *hisbah* also refers to the practice of supervision of commercial, guild, and other secular affairs. Traditionally, a muhtasib (al-Muhtasib) was appointed by the Caliph to oversee the order in marketplaces, in businesses, in medical occupations, etc. See the following link: http://en.wikipedia.org/wiki/Hisbah (accessed on 3/1/2009).

91 This explanation is provided in Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, 39.

92 See Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, pp.495–496.

93 Peace be upon him.

94 Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, p.495.

95 See Ahmed, M. (2004) *Consumer Protection in Islamic Fiqh*, Dar El-Kottob El-Elmia: Beirut; Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, 495; Sarwar, K.M. and Hafeez, A. (2000) 'Consumer laws in Pakistan, a ready reference for consumer and practicing lawyers', unpublished paper that is presented in Consumer Rights Commission of Pakistan.

96 Askalanee, A. (1984) *The Polish of Polish*, Dar El-Fekr, Beirut, book 12, 457; Ofer, M. and Mohamed, Y., *The Basic of Islamic Economy*, El Bayan Publishing, Jeddah without date) 205;

Ofer, M (1985) *Planning and Development in Islam*, El Bayan Publishing, Jeddah, 171; Romanee, Z. (1996) *The Consumption Realty of Islamic World*, 148 the Publication of Islamic Institution, 18.

97 This letter is mentioned in M. Ibrahim, *The explanation of the methodology of eloquence* (Dar Ehea El-Kottob El-Arabeea: Damascus without date) 139; Heete, A. (2004) *Consumer Protection in Islamic Fiqh*, Arab Law Info database 14.

98 This article corresponds with article (5) of the Directive (93/13).

99 The preamble of the Directive (93/13) provides the same meaning.

100 'Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms (2008) 33–3 *European Law Review Journal* 352.

101 Nebbia, P. (2007) *Unfair Contract Terms in EC Law*, Hart Publications, London, 139.

102 Fayad, M. (2010) 'The legislative consumer protection of the use of unfair terms in Palestine, a comparative legal study with the European Directive (93/13/EEC) of unfair terms in consumer contracts', PhD thesis, VUB University, p.430:432.

103 This attention aims to provide consumers with full access to contract terms, not only to understand their meanings but also to examine their consequences rightly. Thus, where the consumer resides in France or where the property or one of the properties is located in the French territories, the offer of the seller has to be written in the French language.

104 In Germany, (SFC) terms can be considered as incorporated into the contract where: the seller *must expressly* draw the attention to any standard terms and conditions applying to the contract; if it is not possible to inform the clients *expressly*, a highlighted notice must at least be displayed; the consumer has to agree these terms clearly, and the seller must give him, in a reasonable manner, the possibility of getting knowledge of the content of the contract.

105 Maannan, M.A. (1990) *Islamic Economics, Theory and Practice, a Comparative Study*, Lahore Publications Institute, Pakistan, 115; Yousef, A. and Awan, K.A. (1995) *Lectures on Islamic Economics*, Islamic Development Bank 7.

106 Marganee, M. (1993) 'Options in Islamic (fiqh) and law', *Islamic Law Journal* 229.

107 See Arabi, O. (1988) 'Studies in modern Islamic law and jurisprudence, Arab and Islamic laws series, 21 *Kluwer Law International* 65; Alafee, A. (1988) 'The options in the civil code of Yemen, a comparative study with Egyptian law, PhD thesis, Ain Shams University, 69; Raslan, A (1997) 'The conception of consumer protection', *The Law and Economy Journal* 86; El-saeed, M. *The Criterion of the Abuse of Power*, Cairo University Publications, Cairo without date, 136; Fooda, A. (2002) *The Interpretation of Contract in the Egyptian and the Comparative Legal Systems*, EL Marref Institution of Publishing, Alexandria, 271.

108 Article (2/3) of the (CPL) stipulates that, *to protect the consumer rights as to obtain goods and services that are consistent with the Binding Technical Instructions, and to ensure transparency of economic transactions to which the consumer is a party.*

109 Specifically, the terms of price; the date and manner of repayment; as well as the date and place of the delivery of goods or services have to be drafted in this manner too.

110 These sanctions deal with the rules of advertising and using defected products.

111 See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199.

112 J Sharkaoee, (1999) *The Theory of Voiding the Legal Behavior in the Egyptian Civil Code*, Dar El-Nahda El-Arabia, Cairo, 307; Marganee, M. (1993) 'Options in Islamic (Fiqh) and law', *Islamic Law Journal* 234; Alafee, A (1988) 'The options in the civil code of Yemen, a comparative study with Egyptian law', PhD thesis, Ain Shams University, 276; Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, 499; Qratem, A., Abou Roqaya, H. and Asaoee, I (1983) 'The evaluation of the regimes of consumer protection', *The Journal of Administration and Economy of the Center of Development and Research of the University of King Abd El-Azeez,* 21; Abd El-Hameed, F. 'The practice of consumer

protection associations, the reality and the challenges of future', unpublished presented paper to a legal conference that was held in Masqat, Oman, April 2001.

113 See articles (300:355) of (*El-Majalla*) code.

114 Yousef, M. *The Option of Inspection in the Islamic Comparative Law*, available on the following link: www.saaid.net/Doat/moslem/34.doc (accessed on 22/10/2008).

115 These articles stipulate *the consumer right to get an access to all documents and texts*, to which the contract refers to, before its conclusion.

116 See the problem of not constituting a clear sanction regarding the requirements of the clarity of contract terms, which is mentioned above.

117 Article (111/1) of the French consumer code.

118 Houndous, E. (1995) 'The reception of the directive on unfair terms in consumer contracts by member states', 3 *European Review of Private law*, 241.

119 Nemer, A (1988) *Consumer Protection in International Relations* (1st Dar El-Nahda El-Arabia, Cairo, 132.

120 Abd El-Salam, A. (2000) *The Obligation to Inform in Contracts*, Dar El-Nahda El-Arabia, Cairo, 25; Refaee, A. (1994) *The Civil Protection for Consumers in Contract Law*, Dar El-Nahda El-Arabia, Cairo, 55; Abd-El-Bakee, O. (2004) *The Contractual Protection for Consumer*, El-Maaref Institution for Publishing, Alexandria, 189; Nemer, A. (1988) *Consumer Protection in International Relations*, 1st Dar El-Nahda El-Arabia, Cairo, 135.

121 Mahdee, N. (1982) *The Obligation to Inform Regarding the Contract Data, and Its Application in Some Forms of Contracts, A Comparative Legal Study*, Dar El-Nahda El-Arabia, Cairo, 76.

122 Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, 503.

123 The holly (*Qura'n*) 4:29.

124 Articles (150) and (200) of (*El-Majalla*) code provide the right of the purchaser to rescind the agreement if its object does not correspond with what the parties agreed on.

125 See also Recital (16) of the Directive.

126 The requirements of good faith embody a general principle of fair and open dealing. It means that, not only that term should not be used in bad faith, but also that it should be drawn up in a way that respects the consumers' legitimate interests. Therefore, in assessing fairness, the (OFT) takes note of how a term could be used. A term is open to challenge if it is drafted so widely that it could be used in a way that harms consumers. Protest that the term is not used unfairly in practice is therefore not enough to persuade the OFT that it is immune from challenge under the Regulations. Claims like this usually show that the supplier could redraft the term more precisely both to reflect its intentions and to achieve fairness. See the OFT Publications, *Guidance of the use of unfair terms in package holiday contracts*, 2004 P5; see also P. Nebbia and T. Askham (2004) *EU Consumer Law*, Richmond Law & Tax LTD, UK, pp.257–258.

127 Howells, G. (1995) 'The implementation of the EC Directive on unfair terms in consumer contracts – some unresolved questions', *Journal of Biblical Literature*, 209.

128 For more details about the role of the good faith principle in protecting the legitimate expectations, see Kolb, R.R. (2006) 'Principles as sources of international law (with special reference of Good faith', *Netherlands International Law Review* 20; Nebbia, P. (2007) *Unfair Contract Terms in EC Law*, Hart Publications, London, pp.143–146.

129 See the preamble of The directive and the preamble of the European proposal on consumer rights; see also Dean, M. (1993) 'Unfair contract terms: the European approach', 56–4 *Modern Law Review,* 584.

130 Rakof, T.D. (1987) 'Good faith in contract performance: Market Street associated LTD. Partnership v. Frey', *Harvard Law Review*, Vol. 120, pp.1187–1199.

131 Nebbia, P. (2007) *Unfair Contract Terms in EC Law*, Hart Publications, London, 149.

132 Recital (16) of the Directive (93/13).

133 Whittaker, S (2004) 'Assessing the fairness of contract terms: the parties' "essential bargain", its regulatory context and the significance of the requirements of Good faith', *Zeitschrift für Europäisches Privatrecht Law Journal*, 251.

134 For more details about the subjective sense of Good faith, see Kolb, R.R. (2006) 'Principles as sources of international law (with special reference of Good faith', *Netherlands International Law Review* 14; Gey, P. (2001) 'Bad faith under ICANN's uniform domain name dispute resolution policy', 23–11 *European Intellectual Property Review,* pp.507–520; Rhein, E. (2001) 'Reverse domain name hijacking: analysis and suggestions', 23–12 *European Intellectual Property Review*, pp.557–564; Schillig, M (2008) 'Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms', 33–3 *European Law Review Journal*, 339.

135 See Radowan, A. (1992) 'Justice and fairness in Islamic law, a comparative legal study between law and Islamic Fiqh', *Colombia Law Review*, pp.261–285.

136 This (*Hadith*) is mentioned in Khan, K. and Aftab, S. (2000) *Consumer Protection in Islam: the Case of Pakistan*, 491.

137 Hette, A. (2004) *Consumer Protection in Islamic Fiqh*, available at the following link: http://www.pdfbooks.net/vb/showthread.php?t=14747 (accessed on 17/1/2009).

138 For example, while the historic arbitration between (*Ali*), the fourth caliph of Muslims, and (*Mu'awiyah*), the fifth caliph of Muslims, consisted of a written agreement, arbitration agreements generally under Islamic law can be made orally as well as in writing. The formalities observed in this particular arbitration were as a result of peculiar political significance, its unique national and constitutional character and its international nature rather than the principles of Islamic law.

139 (*Shatibi*) is an Islamic scholar of the fourteenth century, who wrote the comprehensive (*Fatawas*) of Islamic legal theory. The (*Fatawa)* is the plural of the word '*fatwa*' – a legal verdict given on a religious basis. Abu (Ishak Ibrahim) was a (*Maliki*) scholar from Spain (*Al-Andalus*). He is one of the most important scholars of the (*Maliki*) school of jurisprudence and was responsible for its revival, through his work on (*Masalih al-Mursala*), central to the doctrine of (*Usul al-Fiqh*) (principles of jurisprudence) and also through his (*Fatawa*).

140 Masud, M.K (1995) *Shatibi's Philosophy of Islamic Law* (International Islamic University: Islamabad, 96.

141 See Khamees, H. (1987) *Islamic Law of Treatments*, Dar El-Nahda El-Arabia, Cairo, 69.

142 The holy (Q*ura'n*) 01:143.

143 The holy (Q*ura'n*) 55:07.

144 The holy (Q*ura'n*) 55:08.

145 The holy (*Qura'n)* 25:67.

146 Dawwas, A. (1993) 'Abuse in the exercise of rights in Islamic law and the civil codes of Arab countries', 27–1 *Comparative Law Review* 2.

147 For more details regarding these guidelines, see Hassan, A (1993) *The History of Legal and Social Regimes*, EL-Halabee Publications, Beirut, 199.

148 See Majeed, N. (2004) 'Good faith and due process: lessons from the Sharia', 20–1 *Arbitration International Journal*, 97.

149 Abd-El-Bakee, O (2004) *The Contractual Protection for Consumer*, El-Maaref Institution for Publishing, Alexandria, 451.

150 See Eissawi, A (1963) 'The theory of the abuse of right in Islamic fiqh', *The Journal of Social and Legal Sscience*, Vol. 1, pp.1–120; Nagdee, A. (1991) *The Abuse of Right*, Dar El-Nahda El-Arabia, Cairo, 57.

151 See Tougiannos, L. (1990) *Terminating the Commercial Agency Agreement in the Arab World: Some Concepts to Keep in Mind* (Graham and Trotman, London) 33; Amin, S.H..(1999) *Commercial Arbitration in Islamic and Iranian Law*, Vahid Publications, Tehran, 41.

152 Wakin, J.A. (1972) *The Function of Documents in Islamic Law*, State University of New York Press, New York, 7.

153 See Khan, K. and Aftab, S. (2000) 'Consumer protection in Islam: the case of Pakistan', 490; Gerber, H. (1994) 'State society and law in Islam: Ottoman law in comparative perspective', State University of New York Press, New York, 44.

154 See P. Nebbia and T. Askham, EU consumer law (Richmond Law and Tax LTD: UK, 2004) 259; Brownsword, R., Howells, G. and Wilhelmsson, T. (Eds.) (1994) 'The EC unfair contract terms directive and welfarism', *Welfarism in Contract Law*, Dartmouth, 279; Roppo, V., Final report from workshop 3. The definition of unfairness: the application of Article 3(1), 4(1) and of the annexes of the Directive, Acts of the Brussels Conference, 1–3 July 1999 (Luxembourg, Office of official publications of the European 138; Dean, M. (1993) 'Unfair contract terms: the European approach', 56–4 *Modern law Review* 586.

155 ECJ 478/99, 2002, E.C.R. I-4147; see also Collins (1994) 'Good faith in European contract law', 14 *Oxford Journal of Legal Studies* 229; Hughes, P. (2008) 'Directors' personal liability for cartel activity under UK and EC law – a tangled web', 29–11 *European Commercial Law Review* 632.

156 Dean, M. (1993) 'Unfair contract terms: the European approach', 56–4 *Modern Law Review* 587.

157 ECJ 478/99, ECR I-4147; Hondius, E. (1998) 'Unfair terms in consumer contracts, towards a European Directive', *European Consumer Law Journal*, Vol. 3, p.189.

158 For instance, in Palestine, these proposals were submitted by the head of the economic committee (*Azmee El-Shoaibee*); the proposed amendments that are presented by the Arab federation for consumer (AFC) to the head of the economic committee of the (PLC) in August 2005; the critical review of the draft of the (CPL) (2004) that was prepared by the Palestinian economic policy research institute (MAS), P. 26; and finally the consumer protection association in Gaza strip.

159 The formal letter that was prepared by the legislative department of the (PLC), regarding the proposed amendments of the (CPL), submitted to the head of the economic committee of the (PLC) at 13/6/2005; see also some commandments regarding the remarks of the vice-prime minister on the draft of (CPL) after the second reading of the PLC, presented by the legislative department of the Palestinian council of ministers to cabinet secretariat of the Palestinian council of ministers at 15/10/2005.