Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?

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Abstract

As Australian consumers increasingly engage in electronic transactions with foreign suppliers, they are often subjected to clauses that require foreign arbitration for the resolution of disputes. This article examines the status and enforceability under Australian law of such clauses. While a clear trend in favour of international arbitration of commercial disputes now exists in Australia and elsewhere, it is arguable that such an approach should not be applied in the consumer context. Not only is there an imbalance of power between the parties, but an Australian consumer will often lose substantial protections under Australian law in a foreign arbitration. Reference is made to the divergent treatment of consumer arbitration in other jurisdictions, before discussion on whether an online system of dispute resolution may be the best path forward.

I Introduction

Arbitration has become the leading method for resolution of international commercial disputes. Many reasons are cited for this position, including: the greater enforceability of arbitral awards compared to court judgments; the confidentiality, neutrality and procedural flexibility of the arbitral process; and (perhaps more controversially) the efficiency of arbitration relative to litigation.

The application of arbitration to consumer transactions, specifically business-to-consumer ('B2C') contracts is an issue that has not yet arisen for judicial determination in Australia, but has been the subject of consideration in North America and the European Union ('EU'). Such an issue has become highly topical since consumer contracts now frequently contain arbitration clauses. Online sellers, transport providers, social media and even dating websites typically require consumers to agree to arbitration for resolution of any dispute under their service contracts. Many online purchases by Australian consumers are made with foreign sellers. While arbitration is a valuable means of providing certainty to traders in tying dispute resolution to a single, identified place for all transactions — normally the trader's place of business — they can impose a serious burden on consumers seeking to obtain redress. The question, then, is whether such clauses are enforceable.

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The primary focus of this article is on 'pre-dispute' arbitration clauses, which are terms included in the parties' original agreement that are intended to apply to any disputes that may arise in the future. Such provisions are to be contrasted with 'post-dispute' arbitration clauses, which give the consumer the choice to arbitrate *after* a dispute has arisen. The distinction between the two has little significance in commercial cases, but, as will be discussed, may be highly material in consumer transactions. While a clear majority of countries now accept the right of parties to a commercial agreement to include an arbitration clause to settle their disputes (with only isolated exceptions), the status of pre-dispute arbitration provisions in consumer transactions is far less certain. The issue has become highly pertinent as merchants are increasingly including arbitration clauses in their contracts with consumers, particularly where the consumer is resident in another country, arguably to thwart good faith resolution of any dispute. The logic underpinning this approach is that because most consumer transactions are low value and high volume, it will rarely be in the interest of any individual consumer to arbitrate a single claim in a foreign country at often great distance from their place of residence. The arbitration clause, in effect, acts as a deterrent to fair and balanced dispute resolution.

The United States ('US') Supreme Court has, in a series of decisions, clearly upheld the right of businesses to include and enforce pre-dispute arbitration clauses in contracts with consumers.[1] However, in the EU, the concern has been to shield consumers from such provisions.[2] One explanation for these diverging views lies in the different status accorded to consumers in contract law. Under EU law, a consumer is presumptively treated as a disadvantaged party relative to traders and so must be protected at the contracting stage from any provision that has not been clearly bargained for and that materially affects their interests. By contrast, under US law a consumer is regarded as simply another entity capable of contracting in an individual transaction with any issues of disadvantage or unconscionability to be taken into account by the designated dispute resolution body at the stage of hearing the merits of the dispute.

The current position in Australia is open to debate and the object of this article is to identify the status under Australian law of arbitration clauses in consumer contracts and also to suggest a way forward. Note that while the main subject of the article is cross-border consumer transactions, as many of the same principles also apply to domestic transactions, the position in relation to these is also examined.

The status and enforceability of international consumer arbitration agreements will be considered in three main procedural contexts. The first and most common situation is where a consumer commences litigation in an Australian court against a supplier and the supplier seeks to have the action dismissed on the ground that the parties have included a foreign or local arbitration clause in their agreement. The second situation is where a trader obtains an arbitral award against the consumer in a foreign country and then seeks to enforce the award against assets of the consumer in Australia, which the consumer resists. The third situation is a variant on the second and is where a trader obtains an award in Australia against the

1 See below cases and discussion in Part IIIA.
2 See below Parts IIC(4) and IV.

consumer and the consumer seeks to challenge or annul the award in the Australian courts. From the perspective of the consumer, the legal defences available for resisting arbitration differ according to the procedural stage at which the challenge is brought.

II The Legislative Regime on Enforcement of Agreements to Arbitrate

The starting point for consideration of the place of arbitration clauses in consumer contracts in Australian law is to identify the relevant legislation. As there are no statutes specifically dealing with consumer arbitration, it is necessary to consider the legislation on commercial arbitration. The Australian legislation on both international and domestic commercial arbitration is now very similar. For international transactions, the relevant enactment is the *International Arbitration Act 1974* (Cth) ('*IAA*'). The *IAA* gives effect to the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*'),[3] which is set out in sch 1 of the Act and addresses the enforcement of foreign arbitration agreements and awards. Schedule 2 of the *IAA* sets out the United Nations Commission on International Trade Law ('UNCITRAL') *Model Law on International Commercial Arbitration*,[4] which is the procedural law for arbitrations 'seated' in Australia. For domestic arbitrations, the relevant legislation is the *Commercial Arbitration Act 2011* (Vic) ('*CAA*'),[5] which also enacts the *UNCITRAL Model Law*, with some modifications.

Section 7 of the *IAA* implements art II of the *New York Convention* and deals with enforcement of foreign arbitration clauses or agreements. Section 7(2) then provides that where proceedings are instituted in a court by a party to a relevant arbitration agreement against another party to the agreement and the proceedings involve the determination of a matter that is capable of settlement by arbitration, 'on the application of a party to the agreement, 'the court shall ... stay the proceedings ... and refer the parties to arbitration in respect of that matter'. Section 7(2) provides for a mandatory stay of proceedings in favour of arbitration. Once the requirements of the section are satisfied, then the court has no discretion to retain the matter. Section 7 also may be used to obtain a stay of court proceedings to enforce an Australian-seated international arbitration agreement where, for example, a party to the arbitration agreement was domiciled or ordinarily resident in a Convention country (other than Australia).[6] Article 8 of the *UNCITRAL Model Law* provides an alternative basis for a mandatory stay of proceedings in respect of both foreign-

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3 Opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

4 (adopted 11 December 1985, amended 4 December 2006) GA Res 40/72, 40th sess, 112th plen mtg, UN doc A/40/17 annex I; GA Res 61/33, 61st sess, 64th plen mtg, Agenda Item 77 UN Doc A/61/17 annex I ('*UNCITRAL Model Law*').

5 Versions of the *CAA* have been enacted in the other states and territories: see, eg *Commercial Arbitration Act 2010* (NSW), *Commercial Arbitration Act 2011* (NT), *Commercial Arbitration Act 2013* (Qld), *Commercial Arbitration Act 2011* (SA), *Commercial Arbitration Act 2011* (Tas), *Commercial Arbitration Act 2012* (WA) and *Commercial Arbitration Act 2017* (ACT).

6 *IAA* s 7(1)(d); *Elders CED Ltd v Dravo Corp* (1984) 59 ALR 206; *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd* (1992) 28 NSWLR 321.

seated and Australian-seated international arbitrations and is in similar, although not identical, terms to s 7 of the *IAA*.[7] Very similar principles also apply to the enforcement of a domestic arbitration agreement; that is, where the parties and the arbitration are wholly connected with Australia. Section 8(1) of the *CAA* provides that 'a court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests … refer the parties to arbitration'.

To what arbitration agreements does s 7 of the *IAA* apply? The first situation is where the procedure in relation to the arbitration agreement is governed by the law of a Convention country. The second situation is where a party to the agreement was domiciled or ordinarily resident in a Convention country (other than Australia). An arbitration agreement is further defined in s 3(1) as an agreement in writing of a kind referred to in art II(1) of the *New York Convention*. Under art II, an agreement in writing is defined to include an arbitral clause in a contract or an arbitration agreement signed by the parties or confirmed in an exchange of letters. Section 3(4) of the *IAA* further provides that an agreement is in writing if its content is recorded in any form or it is contained in an electronic communication and the information in that communication is accessible so as to be useable for subsequent reference. For domestic arbitration agreements or stay applications under art 8 of the *UNCITRAL Model Law*, there is a similar writing requirement in ss 7(3) and (4) of the *CAA* and arts 7(3) and (4) of the *Model Law*, respectively.

Section 7(2)(b) of the *IAA* also provides that before a stay of Australian court proceedings will be granted in favour of foreign arbitration, the court must be satisfied that there is a matter 'capable of settlement by arbitration'. This expression has two senses, both of which are relevant to the subject of this article. While this language does not appear in the *CAA* or the *UNCITRAL Model Law*, the principles discussed below apply equally to the context of domestic arbitration clauses and stay applications under the *Model Law*.

A *The Scope of the Arbitration Agreement*

The first meaning of 'capable of settlement by arbitration' is that the claims brought by the plaintiff in the Australian court fall within the scope or terms of the arbitration clause. Since the landmark decision of the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australian Shipping Pty Ltd*,[8] Australian courts now adopt a broad and expansive approach to construction of arbitration clauses with the aim of referring as many of the plaintiff's claims to arbitration as possible. Such an approach is justified by reasons of commercial practicality; specifically, that parties are unlikely to have intended that all possible disputes between them relating to the same transaction would be resolved in different forums, but rather in a single arbitration proceeding. So, where parties employ wide language referring to arbitration of any dispute 'arising out of', 'in connection with' or 'relating to' the

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[7] In practice, however, art 8 has been rarely invoked. An example of such a case was *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd* (1996) 133 FLR 417. See Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis Butterworths, 2nd ed, 2015) 40, 182.

[8] (2006) 157 FCR 45 ('*Comandate Marine*').

contract, any proceedings for breach of contract or infringement of s 18 of the *Australian Consumer Law* ('*ACL*')[9] (the prohibition on misleading or deceptive conduct) will normally be stayed by an Australian court. So, in *Comandate Marine* — where the relevant agreement provided for the submission of all disputes arising out of this contract to arbitration in London (England) — claims for breach of contract and s 18 based on pre-contractual misrepresentations were stayed.[10] The broad approach to construing arbitration clauses in *Comandate Marine* has been followed in later cases.[11] Some courts, however, have acknowledged the 'liberal' approach to construction, but noted that there is 'no legal presumption in favour of arbitration' with the words of the parties' agreement being paramount.[12]

Note that all the above cases concerned business-to-business ('B2B') transactions with no consumer party. The question (not yet considered by an Australian court) is whether the above decisions would be adopted without qualification to a B2C transaction. For the purposes of this section, the definition of 'consumer' relied on is based on s 23(3) of the *ACL*, the *United Nations Convention on Contracts for the International Sale of Goods*,[13] and the *Hague Convention on Choice of Court Agreements*.[14] According to this definition, a person is taken to have acquired goods or services as a consumer where the goods or services are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. Such a definition largely confines consumer contracts to B2C transactions, typically between an individual and a trader. It is acknowledged, however, that non-consumer parties can invoke the protection of s 18 of the *ACL* and also that a broader definition of consumer contract is provided in s 4B of the *Competition and Consumer Act 2010* (Cth) ('*CCA*'), where the amount payable under the contract does not exceed the prescribed amount ($40,000). Such a definition applies to disputes involving the consumer guarantees discussed below[15] and would likely also include certain B2B transactions. The focus, however, in this part of the article is on the B2C context.

Returning to the issue of the scope of the arbitration clause, if this matter were simply viewed as one of contractual construction with the status of the parties irrelevant, then arguably the same principles from the commercial context would also apply to B2C transactions. Hence, an Australian consumer who, despite a foreign arbitration clause, sued a foreign trader in an Australian court for breach of contract and breach of s 18 of the *ACL*, would also be compelled to arbitrate his or her claims.

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9 *Competition and Consumer Act 2010* (Cth) sch 2.

10 *Comandate Marine* (2006) 157 FCR 45, 111 [255].

11 See, eg, *Casaceli v Natuzzi SpA* (2012) 292 ALR 143; *Amcor Packaging (Aust) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 (27 March 2013). See generally Holmes and Brown, above n 7, 44–7; Richard Garnett, 'The Legal Framework for International Arbitration in Australia: The Old and the New' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press 2010) 38, 39–41.

12 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174, 205 [101] ('*Rinehart (No 3)*'); *Rinehart v Welker* [2012] NSWCA 95 (20 April 2012). See also *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 (8 December 2009).

13 Adopted 11 April 1980 (entered into force 1 January 1988), art 2(a). This Convention has been enacted in Australian law, see, eg, *Goods Act 1958* (Vic) s 86.

14 Adopted 30 June 2005 (entered into force 1 October 2015), art 2(1)(a).

15 See discussion below in Part IIC(2).

However, closer attention to the courts' reasoning in those decisions, especially *Comandate Marine*, shows that the process of contractual construction was not policy neutral. Indeed, policy considerations unique to international commercial transactions were highly influential in shaping the courts' approach to arbitration clauses. As Allsop J has noted, a liberal approach to construction of arbitration clauses is underpinned by a sensible commercial presumption 'that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places'.[16] A similar approach can be seen in the NSW Court of Appeal decision in *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)*.[17] In that case, dealing with the analogous context of jurisdiction or choice of court clauses, Spigelman CJ said:

> It is not appropriate to give general words in such a commercial context a narrow interpretation, with the consequence that some disputes which, in a practical sense, arise from the contractual relationship could be determined by courts or tribunals other than that to which the parties have agreed to submit their disputes.[18]

Considering the above principles, it is not clear whether the presence of a consumer as a claimant party would cause a court to depart from the generous and liberal construction of arbitration clauses. However, given the fact that most consumer contracts are not negotiated and are standard form in nature, any assumptions as to that party's intentions at the time of making the contract regarding location or form of dispute resolution would seem dubious and not readily applicable outside the B2B context.

Conceivably, therefore, a court could choose to construe the clause against the party seeking to rely on it (the trader) by analogy with the *contra preferentem* principle. Instead of starting with a strong preference for arbitrating all pleaded claims, a court may instead require the parties to include language in their contract expressly referring any statutory consumer claims to arbitration before ordering a stay of proceedings.

B *Arbitrability of Consumer Claims*

A further possible line of argument for a consumer seeking to escape the clutches of an arbitration clause would be to contend that consumer claims are not 'arbitrable' subject matter. As previously noted, s 7(2)(b) of the *IAA* requires that there be a matter capable of settlement by arbitration before a stay can be awarded. This expression has been further interpreted to require that the claims brought by the plaintiff are appropriate for resolution by private arbitration as opposed to public court adjudication; that is, the claims are 'arbitrable'. As Allsop J said in *Comandate Marine*, a key characteristic that renders certain disputes non-arbitrable is where there is 'a sufficient element of legitimate public interest in these subject matters

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16 (2006) 157 FCR 45, 87–8 [165]. See also *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 (27 May 2011) [8].

17 (2010) 79 ACSR 383.

18 Ibid 398 [60].

making the enforceable private resolution of disputes concerning them outside the national court system inappropriate'.[19]

Once again, however, the question of arbitrability of *ACL* misleading and deceptive conduct claims has only arisen in the context of B2B disputes. Courts have generally assumed, without great analysis, that s 18 (and its predecessor s 52 of the *Trade Practices Act 1974* (Cth) ('*TPA*')) claims are arbitrable once they are found to fall within the scope of the arbitration agreement.

In *Comandate Marine*, Allsop J did, however, suggest that where a *TPA* claim involved public deception as opposed to simply resolving the rights of the parties to the dispute then the public interest in court resolution may prevail over arbitration.[20] No such 'public' element was present in that case. A similar approach was taken by Perram J in the context of another application to stay s 52 proceedings in favour of foreign arbitration: *Nicola v Ideal Image Development Corp Inc*.[21] In that decision, his Honour stated that the *TPA* claims would not involve the arbitrator being 'called upon to assess the nature of the public interest thereby protected nor is it likely that any determination by the arbitrator is likely to have an impact beyond the parties to the arbitration'.[22]

Equally, it could be argued that where an individual consumer is asserting rights under s 18 of the *ACL*, the 'public interest' supporting litigation of such a claim may be more closely engaged. Further support for the view that such claims brought by individual consumers may not be arbitrable comes from the *UNCITRAL Model Law*, which applies as the procedural law (or *lex arbitri*) for both domestic and international arbitrations seated in Australia. Note that art 1(1) of the *Model Law* (and for domestic arbitrations, s 1(6) of the *CAA*) applies only to 'commercial arbitration' with 'commercial' defined to cover matters arising from all relationships of a commercial nature, whether contractual or not:

> Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

It is significant to note that consumer transactions are not included in this list and, indeed, the legislative history to the *UNCITRAL Model Law* suggests that the exclusion was deliberate.[23] Furthermore, a commercial dispute, unlike a consumer one, typically involves parties negotiating 'at arms' length' and concerns 'ownership

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19 (2006) 157 FCR 45, 98 [200]. See also *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 351 (Deane and Gaudron JJ).

20 (2006) 157 FCR 45, 93 [186].

21 (2009) 261 ALR 1.

22 Ibid 16 [61].

23 Howard M Holtzmann and Joseph E Neuhaus, A *Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1994) 32–5 cited in *ASADA v 34 Players* [2014] VSC 635 (19 December 2014) [11]; *Rinehart (No 3*) (2016) 337 ALR 174, 197 [62]; Holmes and Brown, above n 7, 162.

of commercially valuable assets and entitlements to profits generated by those assets'.[24]

While the *UNCITRAL Model Law* definition of 'commercial' does not apply directly to an application to stay court proceedings under s 7 of the *IAA*, it is a further factor suggesting that the public interest would not support a referral to foreign arbitration in the case of a consumer seeking relief under s 18 of the *ACL*. For domestic arbitrations or stay applications under art 8 of the *UNCITRAL Model Law*, where the *Model Law* definition of 'commercial' does apply, a good argument may be made for the non-arbitrability of consumer claims.

C *Public Policy and Consumer Claims*

A variation on the arbitrability principle is the doctrine of public policy and whether it may be relied on to defeat an application for enforcement of an arbitration agreement entered into by a consumer. Public policy is not expressly referred to in s 7 of the *IAA*. However, it may come into play indirectly under s 7(5) (implementing art II(3) of the *New York Convention*), which provides that an arbitration agreement will not be enforced where it is null and void. For domestic arbitration agreements and stay applications under the *UNCITRAL Model Law*, s 8(1) of the *CAA* and art 8(1) of the *Model Law* contain identical wording.

Although no specific choice-of-law rule is provided to determine the validity of an arbitration agreement under s 7(5) of the *IAA*, Australian courts have routinely applied the law of the forum to this issue. Consequently, if an Australian court were seised with an application to stay proceedings in favour of foreign arbitration, a claimant could resist the stay by showing that the arbitration agreement was invalid under Australian law. There are some examples in Australian law of foreign arbitration agreements that are expressly rendered invalid, for example s 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth) and s 43 of the *Insurance Contracts Act 1984* (Cth).

The operation of the doctrine of public policy in the enforcement of arbitration agreements will now be examined in the context of three sets of claims under the *ACL*: misleading and deceptive conduct, consumer guarantees, and unfair contract terms.

1 ACL *Rights: Misleading and Deceptive Conduct*

The interesting and unresolved question is whether a consumer may argue that a foreign arbitration agreement is void in circumstances where the arbitral tribunal would not apply s 18 of the *ACL* because of a choice of foreign law in the parties' contract. The difficulty here is that in pt 2-1 of the *ACL* (in which s 18 is located) there is no express provision invalidating arbitration agreements, nor is there any equivalent to s 67 of the *ACL* (discussed below in Part IIC(2)), which indicates the circumstances in which pt 2-1 applies in terms of choice of law.

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[24] *Rinehart (No 3)* (2016) 337 ALR 174, 197 [66].

The only requirement, as far as territorial scope of s 18 is concerned, is that the foreign trader has either engaged in conduct within Australia or if the conduct occurred outside, the trader was incorporated in, or carried on business in, Australia at the time of the contravention.[25] It is unlikely that foreign corporations engaged in 'one off' or isolated transactions with Australian consumers would be regarded as carrying on business here. What is required for 'carrying on business' under s 5(1) of the *CCA* is that there be 'a series or repetition of acts'.[26] These acts will 'commonly involve "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis"'.[27] However, conduct within Australia in breach of s 18 should be easier to establish. Courts have held that a breach of s 18 occurs where the misleading or deceptive conduct of the trader (such as statements or representations regarding the quality of the goods) was 'received' and accessed by the consumer, which will almost always be in Australia at the consumer's place of residence.[28]

Yet there is still the problem of showing that s 18 applies to prohibit foreign arbitration. For this result to occur, s 18 must be found to be an overriding mandatory rule of the forum. An overriding mandatory rule is a provision of national law that must be applied to vindicate an important public interest and policy regardless of any foreign law chosen by the parties.[29] In essence, if s 18 were such a rule, it could not be evaded by parties' choice of foreign law and arbitration, and the arbitration agreement would be implicitly invalidated. The question whether s 18 forms such an overriding rule has not been clearly determined in Australian law.

In *Comandate Marine*, Allsop J acknowledged that the *TPA* is 'a statute of the highest importance' in the field of consumer protection, but that the requirement to enforce a foreign arbitration agreement in s 7 of the *IAA* was a competing public policy that trumped the policy in the *TPA*.[30] In effect, there were two forum mandatory rules 'competing' for application. The public policy underlying the *IAA* was based also on transnational considerations; specifically, the interests of international trade and the need to respect commercial bargains, and the global support for international commercial arbitration as a dispute resolution mechanism that provides certainty for parties in terms of the agreed forum for dispute resolution.

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25 *Australian Competition and Consumer Commission (ACCC) v Valve Corporation (No 3)* (2016) 337 ALR 647, 680 [158] ('*Valve Corp (No 3)*'); *CCA* s 5(1)(g).

26 *Valve Corp (No 3)* (2016) 337 ALR 647, 687 [197].

27 Ibid, citing *Hope v Bathurst City Council* (1980) 144 CLR 1, 8–9. See also *Vautin v BY Winddown Inc (No 2)* [2016] FCA 1235 (16 September 2016) [44].

28 *Valve Corp (No 3)* (2016) 337 ALR 647, 684–5 [178]–[182]; *Delco Australia Pty Ltd v Equipment Enterprises Inc* (2000) 100 FCR 385; *Anabelle Bits Pty Ltd v Fujitsu Ltd (No 3)* [2009] FCA 1089 (25 September 2009); *ACCC v European City Guide SL* [2011] FCA 804 (22 July 2011) [85]; *ACCC v Chen* (2003) 132 FCR 309.

29 According to art 9(1) of the EU *Rome I Regulation*,

> [o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L 177/6.

30 (2006) 157 FCR 45, 96 [195].

A similar point was made earlier in the context of the judicial policy to interpret arbitration clauses broadly to capture as many of the parties' claims as possible.

Justice Allsop also endorsed the view, earlier expressed by the New South Wales Court of Appeal in the *Francis Travel* case,[31] that a foreign arbitration agreement must be enforced even where it was not apparent that a foreign arbitrator would admit a claim for s 52 of the *TPA*. This was because, for example, foreign law was chosen by the parties to govern the contract. Essentially, therefore, where commercial parties choose both foreign arbitration and foreign law to govern their agreement, they waive their rights to claim under the *TPA* (or *ACL*).[32] The approach in *Francis Travel* was adopted by Hollingworth J in *Transfield*.[33] In that case, a foreign arbitral tribunal had refused to apply s 52 of the *TPA* to a dispute on the basis that Philippine law governed the contract. On the claimant seeking to bring fresh proceedings in the Victorian Supreme Court for breach of s 52, the Court set aside service in the action. Justice Hollingworth found that the claim fell within the scope of the arbitration clause and had been determined by the arbitral tribunal as being not applicable in the arbitration as the matter was governed by the law of the Philippines.

Such decisions clearly suggest that the misleading and deceptive conduct provisions of the *ACL* are not mandatory and so would not allow a party to avoid its obligation to arbitrate in a foreign country.[34] Once again, however, the question is raised as to whether the above principles would automatically apply in the context of a B2C transaction where a consumer was suing in an Australian court. In such a case, it may be asserted that the balance of competing public policies identified by Allsop J would instead fall on the side of consumer protection, rather than of enhancing international trade and certainty of dispute resolution. Such a result would seem compelling given the drastic consequences to a consumer of losing their s 18 rights in a foreign arbitration with (likely) no equivalent cause of action available under the governing law of the contract.

Possible support for this contention comes from the Australian decisions on enforcement of foreign jurisdiction clauses, *Knight v Adventure Associates Pty Ltd*[35] and *Quinlan v Safe International Forsakrings AB*.[36] In both cases, the courts refused to stay local court proceedings brought by consumers for breach of s 18 of the *ACL* on the basis that trial in a foreign country would be seriously burdensome and

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31 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 ('*Francis Travel*') discussed in *Comandate Marine* (2006) 157 FCR 45, 108 [241].

32 But compare *Clough Engineering Ltd v Oil & Gas National Corporation Ltd* [2007] ATPR 42-166, [41] (reversed on other grounds (2008) 249 ALR 458).

33 *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175 (4 December 2006) [72].

34 However, where there is no foreign arbitration clause requiring enforcement under s 7 of the *IAA* and an Australian court is hearing the merits of the action, it is likely that s 18 is a mandatory rule in the sense that the parties cannot exclude its operation merely by choice of a foreign law in their contract: *Francis Travel* (1996) 39 NSWLR 160, 164; *Valve Corp (No 3)* (2016) 337 ALR 647, 668 [102]; compare M Davies, A S Bell and P L G Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 9th ed, 2014) [19.47]–[19.48]. In such a case, there are no mandatory rules 'competing' for application.

35 [1999] NSWSC 861 (27 August 1999).

36 [2005] FCA 1362 (20 December 2005).

oppressive for such parties, most particularly because the consumer claimants would be denied recourse to their s 18 rights.

It is true that the Australian courts' power to stay proceedings based on a foreign jurisdiction clause is discretionary in nature and derived from common law principles, whereas s 7 of the *IAA* and art 8 of the *UNCITRAL Model Law* impose a statutory duty to compel arbitration. Yet the above decisions reveal the importance attached to the *ACL* by courts and their reluctance to see it excluded in proceedings arising from consumer transactions.

An alternative approach adopted in at least one Australian decision involving foreign commercial arbitration agreements involved a court granting a stay of proceedings on condition that the parties consent to any *ACL* claims being heard by the arbitral tribunal.[37] Such an approach has, however, rightly been criticised on the ground that it amounts to the court 'dictat[ing] to the parties what form their arbitration agreement would take as a condition [of] allowing them to arbitrate in accordance with their original agreement'.[38] In any event, an Australian court has no power to bind a foreign arbitral tribunal by directing it as to which laws it may apply. The situation is different where the parties lead expert evidence to show that the tribunal would apply the *ACL*, under the choice-of-law rules applicable in the arbitration.[39]

Another possibility is that an Australian court may adopt the 'second look' doctrine of the US Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*,[40] which has been advocated by some commentators.[41] According to this approach, after an Australian court has granted a stay of all claims, including under the *ACL*, it may still refuse to recognise or enforce any subsequent award on public policy grounds[42] if the foreign arbitral tribunal fails to apply the Australian statute. Of course, from a consumer claimant perspective, such an option is still less attractive than local litigation because of the need to pursue likely more expensive arbitral proceedings abroad.

Note that in the context of a domestic arbitration agreement[43] or an Australian-seated international arbitration agreement, where parties have chosen the law of an Australian state or territory to govern their contract, s 18 will apply in the arbitration unless, as discussed above, the court finds the claim not to fall within the scope of the arbitration clause or not arbitrable.

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37 *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 (15 August 2005) [111].

38 Holmes and Brown, above n 7, 57.

39 *Casaceli v Natuzzi SpA* (2012) 292 ALR 143.

40 473 US 614 (1985).

41 Luke Nottage and Richard Garnett, 'The Top Twenty Things to Change in or around Australia's *International Arbitration Act*' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press 2010), 165–6.

42 Public policy as a basis for challenge to an arbitral award and as a defence to enforcement of an award is discussed more fully below in Part IV.

43 For a comprehensive treatment of domestic arbitration see Doug Jones, *Commercial Arbitration in Australia* (Lawbook, 2nd ed, 2013).

There are two other sets of provisions in the *ACL* that may have an impact on the enforceability of foreign and domestic arbitration agreements in consumer contracts: the consumer guarantees in pt 3-2 div 1 of the *ACL*, and the unfair contract terms provisions in pt 2-3 of the *ACL*.

2 *ACL Rights: Consumer Guarantees*

The second set of *ACL* provisions of relevance to consumer arbitration clauses are the consumer guarantees imposed on suppliers of goods and services in their contracts with consumers. Such guarantees include terms such as that the goods are of an acceptable quality (s 54) or are fit for purpose (s 55). Section 64 of the *ACL* seeks to ensure that the guarantees cannot be excluded, restricted or modified by the terms of a contract by rendering any such term invalid.

A key preliminary question is whether a *foreign* arbitration clause would be caught by s 64. The concern from a consumer's perspective in the context of a contract containing foreign arbitration and choice-of-law clauses is that an arbitrator may not apply the consumer guarantees as they are derived from an Australian statute, the *ACL*. A consumer claimant who sues in an Australian court for breach of such guarantees may, therefore, seek to avoid a stay on this ground. The success of such an argument, however, depends on an Australian court finding that the consumer guarantees of the *ACL* apply to the contract notwithstanding the choice of foreign law.

This issue is addressed by s 67 of the *ACL*, which provides that if:

> (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
>
> (b) a contract for the supply of goods or services contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
>
> (i) the provisions of the law of a country other than Australia;
>
> ...
>
> the provisions of this Division apply in relation to the supply under the contract despite that term.

The effect of s 67 was recently considered by Edelman J in the Federal Court in *Valve Corp (No 3)*.[44] Note first that for s 67 to operate there must be a supply of goods or services 'to a consumer'. A consumer transaction is broadly defined in s 3 of the *ACL* as one in which the amount paid for the goods is not more than $40 000[45] or, if greater than $40 000, the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption.

Assuming there is a consumer transaction as defined, s 67(a) will apply the consumer guarantees to any contract whose governing law is 'objectively' the law

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[44] (2016) 337 ALR 647.

[45] Note that Consumer Affairs Australia and New Zealand have recommended an increase in the threshold to $100 000: *Australian Consumer Law Review Final Report* (March 2017) 72 (Proposal 15) <https://cdn.tspace.gov.au/uploads/sites/86/2017/04/*ACL*_Review_Final_Report.pdf>.

of an Australian state or territory.[46] What this concept means is that where parties have expressly or impliedly chosen a foreign law in their contract — for example, by inclusion of an English choice of law or a London arbitration clause — then the terms must be disregarded in determining the governing law. A foreign jurisdiction or arbitration clause is regarded as an implied choice of the substantive law of the foreign country in which the litigation or arbitration is to take place.[47] Once these clauses are put to one side, the court then identifies the system of law with which the contract has its closest and most real connection, and if this is that of an Australian state or territory, then the consumer guarantees apply to the contract.[48]

The result is that under s 64 of the *ACL* a foreign arbitration clause would be invalid where its enforcement would likely deprive a consumer of the protection of the guarantees through these provisions not being applied by the arbitral tribunal. The difference with the misleading and deceptive conduct provisions discussed above is that there is no provision equivalent to s 64 in pt 2-1 of the *ACL* that expressly invalidates an 'offending' clause. Here the basis of invalidity of the arbitration clause is clearer. A similar result was reached by a majority of the High Court in *Akai*[49] in the context of a foreign jurisdiction clause that was held invalid under equivalent provisions in the *Insurance Contracts Act 1984* (Cth).[50]

An even more direct means of challenging a foreign arbitration clause in a consumer transaction is provided in s 67(b) of the *ACL*. The effect of this provision is that where a term in a contract substitutes the law of a foreign country for div 1 pt 3-2, then the provisions of the division apply. So, where parties have chosen, for example, English choice of law and/or London arbitration clauses that would have the effect of substituting English law in place of the consumer guarantees, such choices are of no effect and the guarantees apply. Section 64 operates to invalidate the foreign arbitration clause to prevent the supplier from avoiding the operation of the guarantees.

The key difference between ss 67(a) and (b) is that sub-s (b) does not require that the contract be objectively governed by the law of an Australian state or territory to apply. Indeed, it is arguable that the operation of s 67(b) makes s 67(a) redundant, since it achieves the same result of imposing the guarantees on traders, but without requiring any choice of law connection with Australia.[51] As Edelman J noted in *Valve Corp (No 3)*, 'the criterion of operation of Div 1 [under s 67(b)] is no longer the proper law of the contract'.[52] While such a result may be considered undesirable from a statutory interpretation standpoint, the plain wording of s 67(b) would seem to compel this outcome.

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46 Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths 3rd ed, 2015) [17.49].

47 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 ('*Akai*').

48 *Valve Corp (No 3)* (2016) 337 ALR 647, 661 [64].

49 (1996) 188 CLR 418.

50 Sections 8, 52.

51 *Valve Corp (No 3)* (2016) 337 ALR 647, 666 [88]; *Laminex (Australia) Pty Ltd v Coe Manufacturing Co* [1999] NSWCA 370 (4 November 1999) [32] (Meagher JA, with whom Cole AJA agreed).

52 *Valve Corp (No 3)* (2016) 337 ALR 647, 666 [88].

Finally, the consumer must show a territorial nexus between Australia and a claim based on the consumer guarantees. Again, the foreign trader must have engaged in conduct within Australia or if the conduct was outside the country, it must have been incorporated in or was carrying on business in Australia. Once more, it may be difficult to show that a foreign trader was carrying on business in Australia. To establish that the offending conduct occurred within Australia requires an examination of the cause of action based on the consumer guarantees. Since the guarantees are premised on a supply of 'goods' by a foreign trader to a consumer (s 54) it is arguable that a supply is only complete when the goods have been made available or delivered to a consumer in Australia.[53] If this analysis is correct, then the consumer guarantees would apply to a foreign trader providing goods to an Australian consumer.

Assuming an Australian consumer can satisfy the above elements, it would have a strong case for resisting foreign arbitration based on the consumer guarantees.

In the case of domestic arbitration or international arbitration with an Australian seat, again where parties have chosen the law of an Australian state or territory in their contract, the guarantees would apply in the arbitral proceeding, assuming such a claim is found to be arbitrable[54] and within the scope of the parties' arbitration clause.[55] While the consumer guarantees are, strictly speaking, not contractual, but statutory in nature,[56] a widely drawn arbitration clause would likely encompass a claim based on them.

3 ACL *Rights: Unfair Contract Terms*

The third set of provisions in the *ACL* that may impact on arbitration clauses in consumer transactions is the unfair contract terms provisions found in pt 2-3. This Part renders 'standard form contracts' subject to a statutory fairness test. Before considering how this test impacts on arbitration clauses in general, the initial question again arises as to whether the unfair contract terms regime applies to a contract containing a foreign arbitration clause. Like the consumer guarantee provisions, pt 2-3 of the *ACL* contains provisions that directly invalidate unfair terms. Like the misleading and deceptive conduct provisions, however, there is no equivalent to s 67 to indicate, in terms of governing law, the contracts to which pt 2-3 applies.[57]

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53 Justin Malbon, 'Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms' (2013) 37(1) *University of Western Australia Law Review* 20, 25.

54 See discussion above in Part IIB.

55 See discussion above in Part IIA.

56 Jeannie Marie Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35(1) *Melbourne University Law Review* 252, 253, 256.

57 This problem was identified in J L R Davis, 'The *Australian Consumer Law* and the Conflict of Laws' (2012) 20(3) *Australian Journal of Competition and Consumer Law* 212, 213–15. The author there suggests that the absence of a provision similar to s 67 in pt 2-3 could lead to evasion of the unfair contract terms regime by foreign traders' employment of foreign choice-of-law clauses in their contracts.

So, like s 18 of the *ACL*, an Australian court would have to find that the unfair contract terms provisions were of such fundamental importance that they applied regardless of the parties' selected foreign arbitration and choice-of-law clauses as overriding mandatory rules. As was noted in the discussion in s 18 the likely success of such an argument is unclear given that there has been no case so far where a consumer has sought to invoke the provisions against a foreign trader. The strong consumer protection policy underlying the legislation may suggest that courts will be sympathetic to such an argument.

Note, however, that even if the unfair terms provisions are found to have overriding mandatory effect, they can again only apply to a consumer contract if the trader was found to have engaged in conduct within Australia or carried on business in this country under s 5(1) of the *CCA*. In determining whether there was conduct in Australia, the unfair terms regime, like the consumer guarantees, is arguably premised on a 'supply' of goods or services from a trader to a consumer.[58] Hence, as argued above in respect of the consumer guarantees, a supply would occur in Australia where goods are made available and delivered to a consumer here.

If pt 2-3 applies to agreements containing a foreign arbitration clause, a contract term will be invalid where the term is unfair and the contract is a 'standard form contract'.[59] A 'standard form contract' is not defined in the *ACL*, but would normally refer to 'a document prepared by a trader of goods or services and routinely used by the trader in all transactions'.[60] Such contracts are typically 'concluded without negotiation'.[61] The contract must also be a 'consumer contract', which is defined in s 23(3) of the *ACL* as a 'contract for a supply of goods or services ... to an individual whose acquisition of the goods, services ... is wholly or predominantly for personal, domestic or household use or consumption'. 'Unfairness' is defined in s 24(1) of the *ACL* to include terms that would cause 'a significant imbalance in the parties' rights and obligations … not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and it would cause detriment … to a party' if enforced. Section 25(1)(k) of the *ACL* also provides examples (a 'grey list') of clauses that may be unfair with a relevant example being a term that 'limits, or has the effect of limiting, one party's right to sue another party'.

Assuming that a B2C contract satisfies the definition of a standard form consumer contract, the critical question is whether an arbitration clause would cause a 'significant imbalance in the rights and obligations of the parties'. This concept focuses on whether the term is weighted in favour of the trader, for example, where it imposes on the consumer a disadvantageous burden or duty.[62] While, on its face, an arbitration clause may appear 'symmetrical'[63] and evenly weighted between trader and consumer, the effect of such a clause, particularly where it provides for arbitration in a foreign country, is arguably unfair. For example, where it is shown

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58 *ACL* s 23(1).
59 Ibid.
60 Jeannie Paterson, *Unfair Contract Terms in Australia* (Lawbook, 2011) [5.50].
61 Ibid.
62 *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481, 494 [17].
63 Paul Jammy, 'Can Arbitration Clauses Prevent Class Actions? The Implications of *AT&T Mobility LLC v Concepcion*' (2012) 86(10) *Australian Law Journal* 666, 668.

that an Australian consumer would be denied *ACL* rights in a foreign arbitration, such as under s 18, when combined with the general cost and burden of having to arbitrate a relatively low value claim in a foreign country, a court could find the term unfair.[64]

In the case of domestic arbitration or international arbitration with an Australian seat, the position is not so disadvantageous for consumers since they would retain their rights under the *ACL* in the arbitration (or in a court if the claim was found to be not arbitrable). Yet a consumer may still argue that it is unfair for it to have to pursue a low value claim in a potentially high cost form of dispute resolution with which the trader is more familiar. Furthermore, the availability of class action litigation for collective consumer claims may provide an even more attractive option for consumers.

In class action litigation, it has been suggested that the imbalance between trader and consumer (and detriment to the consumer) caused by an arbitration clause (whether domestic or foreign) is particularly manifest. Because a class action procedure allows the consolidation of often many low value consumer claims in a single collective proceeding, it provides a uniquely affordable means of access to justice. Hence, to compel a potential class member to seek redress through an expensive individual arbitration proceeding where the legal costs would likely exceed the amount in dispute could be particularly unfair. Indeed, the consumer's true choice in such a situation may be 'between participation in a class action and not pursuing the claim at all'.[65] The presence of a class action waiver-type provision where a consumer renounces its right to pursue class relief, when attached to an arbitration clause, may strengthen the case for challenging the clause as an unfair term. This conclusion would arguably follow even where, for example, an individual consumer would retain substantial consumer protections (such as the guarantees above) in an arbitral proceeding.

Once again, the above concerns are only magnified where the clause requires the consumer to arbitrate in a foreign country, perhaps at great distance from his or her place of residence. It is therefore surprising that some of the US commentators who have been critical of the application of unfair terms legislation to exclude arbitration in consumer contracts, claiming that 'access to courts … is not access to justice', do not refer to class action procedures.[66]

Finally, it is worth noting that since 12 November 2016, the *ACL* unfair terms regime has also applied to B2B contracts involving small businesses. Arguably, where a contract between a large corporation and a small business exhibits a similar 'significant imbalance in the rights and obligations of the parties', an arbitration clause in such a contract may also be found to be unfair. A franchisor-franchisee dispute, such as was seen in the *Subway* case,[67] may be a good example.

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64 Stephen Corones et al, *Comparative Analysis of Overseas Consumer Policy Frameworks* (Commonwealth of Australia 2016) 216 [6.10.1].

65 Jammy, above n 63, 668.

66 See, eg, Ronald A Brand, 'Transaction Planning Using Rules on Jurisdiction and for the Recognition and Enforcement of Judgments' (2013) 358 *Collected Courses of the Hague Academy of International Law* (*Hague Recueil)* 9, 212.

67 *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49.

4 *Unfair Contract Terms: The UK Position*

Further guidance on the impact of unfair terms provisions on arbitration clauses may be gained from examining the United Kingdom ('UK') legislation that has existed since 1999 and was recently re-enacted in pt 2 of the *Consumer Rights Act 2015* (UK). The legislation was originally based on the *EU Directive on Unfair Terms*.[68] On the question of 'imbalance' between the parties, the focus of both the courts and commentators[69] has been on the issue of the 'prohibitive expense' of arbitration for consumers. So, in *Zealander v Laing Homes Ltd*[70] a consumer was held not bound by an arbitration clause in circumstances where enforcement of the clause would compel the consumer to bring two separate actions (contract and tort) in separate forums (arbitration and litigation) at great expense.

More recently, in *Mylcrist Builders Ltd v Buck*,[71] the Court took a similar approach, noting that 'detriment' to the consumer could arise where the sums in dispute are small, but the fees payable to the arbitrator are 'comparatively significant'.[72] In *Mylcrist*, such a situation existed where the sum in dispute was £5200, but the legal fees would have amounted to £2000. In assessing the issue of detriment, the Court considered it appropriate to compare the costs of an arbitration with the position if the matter had been litigated. Here the arbitration clause was also found to be unfair because it had been insufficiently clearly and prominently displayed to the consumer and had been simply included in the trader's standard terms. The requirement for fair and open dealing between the parties means that an arbitration clause needs to be specifically drawn to the consumer's attention.[73] The issue of transparency of contract terms is discussed further below in the context of online arbitration clauses.

A contrasting result, in the context of a foreign arbitration clause, was reached in *Heifer International Inc v Christiansen*.[74] This case involved a contract to carry out building works in a house in England between a Russian national/English resident and five Danish residents who were architects and workmen. The contract contained a Danish arbitration clause. When the English resident claimant sued in the English court, a stay of proceedings in favour of arbitration was awarded. The Court found that there was no 'unfairness' in having a matter arbitrated in the domicile of the defendants, particularly where much of the work was to be performed in that country. Such a decision shows that it will not be in every case that a foreign arbitration clause will be found to be unfair. What is important to note in *Heifer* was that the claimant was a very sophisticated and wealthy Russian émigré with ample means to obtain independent advice and conduct foreign proceedings; hardly your average consumer.

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68 *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

69 David Collins, 'Compulsory Arbitration Agreements in Domestic and International Consumer Contracts' (2008) 19(2) *King's Law Journal* 335, 343.

70 (2000) 2 TCLR 724 (TCC).

71 [2008] EWHC 2172 (TCC) (19 September 2008) ('*Mylcrist*').

72 Ibid [55].

73 Ibid [56]–[57].

74 [2008] 2 All ER (Comm) 831.

A final point to note on the UK regime is that there exists a provision that has no counterpart in Australian law that operates to limit consumer arbitration still further. Section 91 of the *Arbitration Act 1996* (UK) provides that a consumer arbitration agreement is unenforceable where the claim is for a pecuniary remedy that does not exceed £5000. In such a case, unfairness is presumed based on the value of the transaction without the need to establish it on the facts of an individual case. The *ACL* provisions, by contrast, apply the general test of unfairness to all contracts.

5 *Unfair Contract Terms: The Online Dimension*

A further important issue concerning unfair terms and consumer arbitration clauses is transparency. Section 24(2) of the *ACL* specifically provides that in determining whether a term is unfair, the court must consider the extent to which the term is transparent. Section 24(3) further provides that a term is transparent if it is '(a) expressed in reasonably plain language; and (b) legible; and (c) presented clearly; and (d) readily available to any party affected by the term'.

It is well known that standard form consumer contracts can be presented in a manner that is not easy to understand for the layperson.[75] The problem is magnified in the online context where key terms may only be accessible by a hypertext link or dropdown box. Given the likely prejudicial consequences for a consumer in being subjected to a foreign arbitration proceeding, imposing an obligation on a trader to provide adequate notice to the consumer of the clause and securing his or her assent to the provision would seem to be required by 'transparency'.[76]

The issue of transparency with online arbitration clauses has been considered in several US decisions that may be instructive in the Australian context. In the leading decision of *Specht v Netscape Communications Corp*,[77] the Court found that a claimant consumer was not bound by an online arbitration clause in circumstances where the user was not required to give his or her assent to the terms and conditions (including the clause) before making a purchase. The test applied by the Court was whether the contractual terms were 'reasonably conspicuous' and whether the plaintiff's alleged assent to them was 'unambiguous'.

Consequently, in later US decisions, it has been held that as long as the layout and language of the website gives the user reasonable notice that a 'click' will manifest his or her consent to the terms and conditions of the agreement, then the agreement, including the arbitration clause, is valid.[78] Further, if the terms are not

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75 Paterson, above n 60, [8.30].

76 See generally Jeannie Marie Paterson, 'Consumer Contracting in the Age of the Digital Natives' (2011) 27(2) *Journal of Contract Law* 152.

77 306 F 3d 17 (2nd Cir, 2002).

78 *Jallali v National Board of Osteopathic Medical Examiners Inc*, 908 NE 2d 1168 (Ind CA, 2009); *Feldman v Google Inc*, 513 F Supp 2d 229 (ED Pa, 2007); *Hines v Overstock.com Inc*, 380 Fed Appx 22 (2nd Cir, 2010); *Hancock v Am Tel & Tel Co*, 701 F 3d 1248 (10th Cir, 2012).

displayed on the site, but must be brought up by using a hyperlink, a clear prompt must be provided directing the user to read them.[79]

While these US decisions did not involve application of legislation similar to the Australian unfair contract terms legislation, the reasoning described above is reminiscent of English cases such as *Mylcrist*[80] and so may be valuable guidance on the question of 'transparency'. However, the fact that an arbitration clause is found to be transparent will not preclude a finding of unfairness on more general grounds, such as where an imbalance is caused in the rights and obligations of the parties.

III Consumer Arbitration in North America

A *The US Freedom of Contract Model*

The US cases considered above on online arbitration clauses reveal some willingness to protect consumers from clauses that are hidden or confusing. Interestingly, however, where a consumer is found to have received adequate notice and given consent to be bound by the clause, a series of decisions by the US Supreme Court has taken a very strong line in favour of enforcement. This outcome has been reached even where the effect of the arbitration clause has been to deny a consumer the right to participate in class or representative proceedings.

In *AT & T Mobility LLC v Concepcion*,[81] a consumer sued AT & T for falsely advertising that a product was free while imposing a US$30 charge, and sought to include its claim in a class action. The defendant responded by seeking a stay of proceedings based on an arbitration clause in the parties' agreement that also prohibited class litigation. The Californian courts refused to enforce the arbitration clause because class action waivers in consumer arbitration agreements were void for unconscionability. The defendant successfully appealed to the US Supreme Court, with the Court finding that the consumer was bound by the clause. The Court saw the dispute as a conflict between the public policy in favour of class action litigation and the 'liberal federal policy favoring arbitration'[82] as represented by the *Federal Arbitration Act* ('*FAA*').[83] Ultimately, the Court favoured arbitration, finding that to refuse to enforce the class action waiver would have a disproportionate impact on the consensual nature of arbitration agreements. Class action waivers were not, by themselves, unconscionable.

By contrast, the minority judges found that class action litigation was appropriate for consumer claims not only in its deterrent effect, but also in providing a remedy for individuals with low value claims.[84] In such circumstances, compulsory arbitration was not a suitable method of dispute resolution. Moreover, the use of

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79 *Feldman v Google Inc*, 513 F Supp 2d 229 (ED Pa, 2007), 236–7; *Sgouros v TransUnion Corp* 817 F 3d 1029 (7th Cir, 2016).

80 [2008] EWHC 2172 (TCC) (19 September 2008).

81 563 US 333 (2011) ('*Concepcion*').

82 Ibid 339, 346.

83 9 USC.

84 563 US 333 (2011) 365–6.

class action waiver terms is often imposed by commercial entities on consumers with the purpose of discouraging claims.

In response to the minority judges' concerns, the majority in *Concepcion* noted that, in any event, the contract included provisions of a beneficial nature to consumers, which made it unlikely that disputes would go unresolved.[85] Such provisions included the fact that AT &T would pay all costs for non-frivolous claims, that the consumer had a choice as to whether to proceed with the arbitration in person, over the telephone or based purely on written submissions and that either party was entitled to bring a claim in a small claims court, instead of arbitration.[86] While these factors mitigate the effects of the majority's ruling to some extent, they are no substitute for a class procedure and, moreover, would be of limited assistance in the context of a foreign arbitration where more prejudicial laws for consumers could be applied.

In a more recent case, *American Express Co v Italian Colors Restaurant*,[87] the US Supreme Court again enforced an arbitration clause in circumstances where the parties had excluded claims being brought in class actions. This time, however, the Court did not identify any 'ameliorating' features of the agreement in their decision to refer the parties to arbitration. The Court emphasised that there is no legislative command to overcome the obligation in the *FAA* to enforce arbitration agreements. The Court again had no sympathy with the view that the low value of the claim may limit access to justice for consumers, where arbitration is ordered, saying that 'the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy'.[88] Again, the minority judges, in recognising the importance of arbitration, saw its danger as creating 'a mechanism … to block the vindication of meritorious federal claims and insulate wrongdoers from liability'.[89]

The most recent decision of the US Supreme Court on consumer claims and arbitration was in *DIRECTV* in 2015.[90] There, the Supreme Court reversed a decision of a Californian court that had refused to enforce an arbitration agreement between DIRECTV and its customers. As in the above decisions, the service agreement included a mandatory arbitration clause coupled with a waiver of class proceedings. Interestingly, however, DIRECTV's agreement also carved out an exception to mandatory arbitration as follows: 'If [however] the law of your state would find this agreement to dispense with class action procedures unenforceable then this entire [arbitration clause] is unenforceable.'[91]

The customers filed a class action complaint against the trader in the Californian courts, alleging that the company had charged early termination fees to its customers in violation of Californian consumer protection law. DIRECTV sought a stay in favour of arbitration. The California Court of Appeal refused to enforce the

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85 *Concepcion*, 563 US 333 (2011) 337, 352.
86 Ibid.
87 133 S Ct 2304 (2013).
88 Ibid 2311 (emphasis in original).
89 Ibid 2320.
90 *DIRECTV Inc v Imburgia*, 136 S Ct 463 (2015).
91 Ibid 469.

clause, finding that the above carve out for 'the law of your state' was a specific exception to arbitration. The US Supreme Court reversed that decision, holding that the arbitration agreement must be enforced under *Concepcion*, which is an 'authoritative' interpretation of the *FAA*. The Californian Court of Appeal's decision was insufficiently appreciative of the federal mandate in favour of arbitration, in its conclusion that the expression 'law of your state' preserves the operation of state law. Such a phrase could only mean 'valid' state law and so any state law that was inconsistent with the *FAA* was pre-empted.[92]

The *DIRECTV* decision shows just how expansive the US Supreme Court's pro-arbitration approach in consumer cases has become. Here was an arbitration clause that specifically targeted and negated the class action waiver and so arguably removed the case from the scope of the holdings in *Concepcion* and *American Express*. Yet, the Court maintained its strict adherence to arbitration. While the US cases involved domestic arbitration clauses there was no suggestion that foreign provisions would be differently treated. In fact, the *FAA* (implementing art II of the *New York Convention*) provides for a mandatory stay of court proceedings in such cases.[93] It seems, therefore, that in the US context only federal legislation that specifically enshrines the rights of consumers in arbitration can alter this position.[94]

The approach taken by the US Supreme Court to consumer arbitration clauses has received a mixed response from commentators. According to one view, to apply principles derived from international commercial arbitration to the consumer context is misguided as it ignores the fact that consumers are often 'unwitting parties to unconscionable agreements'.[95] Compulsory arbitration merely serves to 'unfairly favour corporate defendants'[96] and allow corporate abuses to go undetected through the confidentiality of the process.[97] By contrast, others have strongly defended the current position, saying that it provides merchants with predictability, clarity and finality in dispute resolution. Moreover, including protective rules for consumers in arbitration agreements will not assist such persons since merchants will simply choose 'to increase prices or ... refuse to sell to consumers from countries with legal rules the merchant considers to be too onerous to justify the resulting increased risk

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92 Ibid 469–71.

93 9 USCA s 3.

94 In the US, some lawmakers have proposed EU-style legislation that would prohibit 'pre-dispute' arbitration clauses in consumer transactions, but such laws are unlikely ever to be enacted. See, eg, the *Arbitration Fairness Act 2015*, which was introduced as a bill but not passed in 2015 and then reintroduced in 2017: *HR 1374 — 115th Congress: Arbitration Fairness Act of 2017* (26 December 2017) GovTrack <https://www.govtrack.us/congress/bills/115/hr1374>.

95 Linda S Mullenix, 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses' (2015) 66(3) *Hastings Law Journal* 719, 723.

96 Ibid 756. For other critical commentary see Jonette Watson Hamilton, 'Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?' (2006) 51(4) *McGill Law Journal* 693; Jean R Sternlight and Elizabeth J Jensen, 'Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?' (2004) 67(1–2) *Law and Contemporary Problems* 75; Thomas H Koenig and Michael L Rustad, 'Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses' (2014) 65(2) *Case Western Law Review* 341.

97 Pablo Cortés, 'The Consumer Arbitration Conundrum: A Matter of Statutory Interpretation or Time for Reform?' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (OUP, 2016) 75.

and transaction costs'.[98] Consumers will, therefore, be denied access to goods and services by a protectionist regime.

Such an approach assumes that such consequences have occurred in those pro-consumer jurisdictions, yet no empirical studies of which the author is aware confirm this. Supporters of the US view also attack the idea that 'access to courts is access to justice', noting that in the cross-border context, a successful consumer claimant who sued the trader in the consumer's place of residence would also likely have to bring enforcement of judgment proceedings in the trader's place of business. In a low value claim, the costs would be a likely deterrent.[99] While this point has force in *individual* consumer claims, it underrates the cost benefits of collective class action litigation. It also ignores the wider community benefit of a public declaration from a court that an individual trader has acted improperly towards consumers.

B *Canada: A More Balanced Approach?*

By contrast, Canadian courts have been more nuanced, although not entirely consistent, in their treatment of arbitration clauses in consumer transactions.

In *Dell Computer Corp v Union des Consommateurs*,[100] the Supreme Court of Canada enforced an online arbitration clause that also contained a class action waiver. The Court was satisfied that the consumer had sufficient access to the clause by a hyperlink on the website titled 'Terms and Conditions of Sale', which the user was required to 'click' on and give its assent. The fact that the contract was contained in a contract of adhesion was irrelevant. Significantly it was for the arbitrator to determine whether the arbitration agreement was valid, not the court, under the recognised principle of competence-competence found in art 16 of the *UNCITRAL Model Law*.[101]

Hence, the *Dell* case suggests a strong inclination to apply the principles of international commercial arbitration to consumer arbitration agreements, treating such clauses as presumptively valid and enforceable. So far, there is a clear parallel with the US jurisprudence.

However, the more recent decision in *Seidel v TELUS Communications Inc*[102] represents a possible retreat from the above view. *Seidel* involved claims for misleading and deceptive conduct under the British Columbia *Business Practices and Consumer Protection Act* (BC) ('*BCCPA*'). One claim, under s 171 of the *BCCPA*, was an action for damages brought by an individual who had suffered loss arising from an infringement of the Act. Another claim, under s 172, was an action for a declaration and/or injunction in respect of breaches of the Act. Significantly, the latter claim could be invoked by a person who had not suffered loss or damage,

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98 Brand, above n 66, 217.

99 Ibid 216.

100 [2007] 2 SCR 801 ('*Dell*').

101 Note, however, that the Court's second finding ignores the fact that under art II(5) of the *New York Convention* and art 8 of the *UNCITRAL Model Law*, the court, on a stay application, has the power to refuse such an order where the arbitration clause is invalid. The power to declare an arbitration clause void is, therefore, best seen as a concurrent jurisdiction held by both court and arbitral tribunal.

102 [2011] 1 SCR 531 ('*Seidel*').

but was a 'consumer activist' or 'self-appointed private enforcer' seeking to implement the standards of consumer protection under the Act. The unique 'public interest' features of s 172 — specifically, the right of 'unaggrieved' persons to sue for declaratory or injunctive relief — amounted to a legislative intention to override arbitration and to confer exclusive jurisdiction on the local court to give relief. The Court therefore found that the s 172 claim was not 'arbitrable'.

Consequently, while the s 171 claim was referred to arbitration as it was essentially a 'private law' action, the s 172 plea remained in court. Although bifurcated proceedings are not desirable in principle, such a conclusion was compelled by the consumer protection purpose of the legislation. Interestingly, the Court in *Seidel* distinguished *Dell* on the basis that while arbitration clauses were generally enforceable, such a policy must bow to a clear legislative intention to exclude arbitration.[103]

Later Canadian lower court decisions have placed differing interpretations on *Seidel.* The 'narrow' view suggests that the decision rests entirely on the nature of s 172 as a public interest claim for a declaration/injunction that 'any person' could invoke. Where a claim for damages, even under consumer protection legislation, is brought by a person who has suffered loss, then it will be regarded as a private law claim that is capable of settlement by arbitration.[104] The 'broader' view of *Seidel* is that the prohibition on consumer arbitration is not confined to claims arising under provisions similar to s 172, but may arise in any circumstances where consumer protection legislation was designed to give relief to an individual in court.[105] With respect, this last interpretation seems to ignore the fact that the Court in *Seidel* specifically distinguished public and private consumer protection law claims, with only the former being excluded from arbitration. From an Australian perspective, the decision in *Seidel* may have relevance, given the powers of the Australian Competition and Consumer Commission ('ACCC') as regulator to enforce provisions of the *ACL* on behalf of consumers.

To complete the Canadian picture, both Ontario[106] and Quebec[107] have legislation that prohibits consumer arbitration, while Alberta requires the consent of the Minister before a consumer arbitration clause may be enforced.[108] The diversity of responses in Canada is, therefore, testament to the contentiousness of the issue.

IV Enforcement and Challenge of Arbitral Awards

The procedural context so far considered is where a consumer claimant sues in an Australian court seeking redress and a merchant responds by seeking a stay or dismissal in favour of foreign or local arbitration. The other procedural situation in

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103 Ibid 543–4 [2], 565 [41].

104 *Zwack v Pocha* [2013] 3 WWR 194.

105 *Briones v National Money Mart Co* [2013] MBQB 168 (11 July 2013) (affd [2014] MBCA 57 (5 June 2014)).

106 *Consumer Protection Act*, RSO 2002, c 30, s 7(2).

107 *Consumer Protection Act*, RSQ, c P-40.1, s 11(1) (introduced in 2006 to reverse the effect of the *Dell* case).

108 *Fair Trading Act*, RSA 2000, c F-2, s 16.

which a consumer arbitration clause may come before an Australian court is where a merchant obtains an arbitral award in a foreign country and then seeks to enforce the award in Australia. A variant on this case is where a merchant secures an award against an Australian consumer in an arbitration in Australia and the consumer applies to an Australian court to challenge or annul the award. The principles to be applied to both enforcement and challenge proceedings are almost identical.

Where a merchant seeks recognition and enforcement of a foreign arbitral award in Australia, then the key provision is s 8 of the *IAA*, which implements art V of the *New York Convention*. Under s 8, a foreign arbitral award is presumptively enforceable in Australia unless the defendant can satisfy one of the defences in ss 8(5) and (7). From a consumer perspective, the defences that would most likely be relevant are sub-ss (5)(c), and (7)(a)–(b); respectively, that the defendant was not given proper notice of the arbitration proceedings or was unable to present his or her case to the tribunal, that the subject matter of the arbitration was not arbitrable, or that enforcement of the award would be contrary to public policy.

The issues of notice of arbitration proceedings or inability to present one's case before a tribunal are largely factual questions, but a court may be prepared to apply these defences generously in the case of consumers who often have limited resources to engage in dispute resolution.

The question of arbitrability was explored above and would likely embrace a 'commercial' element like that expressly required in *UNCITRAL Model Law* arbitrations. The difference at the stage of recognition and enforcement is one of choice of law: arbitrability is not governed by the law of the place of arbitration, but by the law of the country of enforcement. What this change means is that even where a consumer matter is found to be arbitrable under the law of the seat of arbitration, for example, the US, a different approach could apply under Australian law, where the award is to be enforced.

Regarding the public policy defence, there is again no direct Australian authority on how it may apply in consumer arbitrations. In commercial arbitration, the defence has been restrictively interpreted to apply only where enforcement would 'violate the forum state's most basic norms of morality and justice'.[109] A narrow view of the defence is justified on the basis that finality and mobility of arbitral awards across borders are key objectives of the *New York Convention*.[110] There must therefore be 'compelling reasons before enforcement of a Convention award can be refused on public policy grounds … reasons [that] must go beyond the minimum which would justify setting aside a domestic judgment or award'.[111]

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[109] This is the classic definition of the defence that comes from the US Second Circuit Court of Appeals judgment in *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier* 508 F 2d 969, 974 (2nd Cir, 1974), which has been cited with approval in a number of recent Australian decisions including: *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 384 [76]; *Uganda Telecom v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, 436 [128]; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2*) (2012) 201 FCR 535, 555–6 [91].

[110] *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2*) (2012) 201 FCR 535, 555 [90].

[111] *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, 215–16 (Bokhary PJ) cited with approval in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 385–6 [79].

Consequently, the public policy defence has been successfully invoked in very few decisions. Once again, however, given the different nature of the relationship in consumer contracts — notably the frequent imbalance in bargaining power and knowledge between the parties — arguably a wider approach to public policy could be taken.

Support for this view comes from two decisions of the European Court of Justice ('ECJ') where art 6(1) of the 1993 *EU Directive on Unfair Terms* was considered in the context of applications to annul arbitral awards. Article 6(1) provides that an unfair term will not be binding on a consumer. In the 2006 *Mostaza Claro* case,[112] the ECJ declared that the court asked to annul an award 'must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term [under the Directive], even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in ... the [court] action for annulment'.[113]

The rationale for this approach is that art 6(1) is an overriding mandatory provision that applies regardless of the parties' agreement. In effect, therefore, the Directive formed part of the public policy of the enforcing or annulling state.

The *Mostaza Claro* case was followed in *Asturcom Telecomunicaciones SL v Rodriguez Nogueira*,[114] where the ECJ held that art 6(1) of the Directive is a rule of public policy of equal status to national law rules with courts having a duty to assess whether the arbitration clause complies with its terms. What was particularly significant about the *Asturcom* case was that the consumer did not participate in the arbitration or seek annulment of the award before the national court. Yet, the ECJ said that the national court, when hearing an annulment or an enforcement application, must consider, of its own motion, whether an arbitration clause is unfair under the terms of the Directive.

In both the *Mostaza Claro* and the *Asturcom* cases, the ECJ appears to treat consumers as a presumptively weaker party in the same manner as the *Brussels I Regulation* (recast)[115] does in the context of personal jurisdiction. Relevantly, art 19 of the Regulation declares a pre-dispute jurisdiction or choice of court clause not enforceable against a consumer in all circumstances. The assumption underlying *Mostaza Claro* and *Asturcom* is similar: that an arbitration clause in a consumer contract will always trigger public policy considerations based on a perceived imbalance of bargaining power between the parties. The Court's conclusion does not appear to depend on the individual circumstances of the case; in particular, the capacity and means of the consumer to participate in the proceedings on an equal footing with the trader. Given that very similar unfair contract terms legislation exists in Australia, it is arguable that an Australian court could take a similar approach if enforcement of a foreign arbitral award was sought against a consumer. Specifically, an Australian court could consider that the legislation forms part of

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112 *Mostaza Claro v Centro Móvil Milenium SL* (C-168/05) [2006] ECR I-10421 ('*Mostaza Claro*').

113 Ibid I-10449 [39].

114 (C-40/08) [2009] ECR I- 09579 ('*Asturcom*').

115 *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2012] OJ L 351/1.

local public policy and so deny enforcement. Given that arts 34, 35 and 36 of the *UNCITRAL Model Law* (and ss 34, 35 and 36 of the *CAA*) are in almost identical terms to s 8 of the *IAA*, it is likely that the same position would apply in respect of both proceedings to enforce awards made in Australia arising from consumer transactions and in applications to annul such awards.[116]

A more nuanced approach to public policy would not involve a refusal to enforce an award in every case involving a pre-dispute consumer arbitration clause. Rather, the key question may be whether the foreign arbitral tribunal in its award disregarded mandatory consumer protection provisions under Australian law,[117] such as s 18 or the consumer guarantees. It was noted earlier, in the context of an application to stay proceedings, that an Australian court may find that s 18 is a mandatory rule that overrides the obligation to proceed to foreign arbitration. If, however, the trader commenced arbitration against the consumer and obtained an award in its favour, then the consumer should equally be able to rely on the failure to apply the consumer protection provisions as a 'public policy' defence to enforcement.

On balance, therefore, even if a consumer arbitration agreement would be enforceable under Australian law through a stay of conflicting court proceedings (which, as argued above, is doubtful), there would still be scope for a consumer to challenge any award obtained.[118]

V A Way Forward?

So, consumer arbitration has generated polarised responses across the world. In the US and, to a lesser extent, Canada, arbitration clauses in consumer contracts have generally been enforced if the consumer had adequate notice of the clause before assenting to the provision. Arguments as to the general unfairness of such clauses by reference to the imbalance of bargaining power between the parties or the differential costs burden, have largely fallen on deaf ears. In the EU, by contrast, (including the UK), arbitration clauses have generally been regarded as attempts by battle-hardened traders to impose unconscionable terms on vulnerable, inexperienced consumers. Although there are no Australian decisions on the status of consumer arbitration agreements, the legislative landscape (in particular, the unfair contract terms and consumer guarantee provisions) suggests that an Australian court may be inclined to follow the EU position.

Yet, until clear judicial guidance is provided, the position would seem to be open in Australian law and on that basis the question is whether an alternative path could be carved out for consumer arbitration.

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116 Public policy has 'a similar meaning' in both types of proceeding: *Castel Electronics Pty Ltd* v *TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* (2012) 232 FCR 311, 320 [23].

117 Norbert Reich, 'Party Autonomy and Consumer Arbitration in Conflict: A "Trojan Horse" in the Access to Justice in the EU *ADR Directive 2013/11*?' (2015) 4(1) *Penn State Journal of Law and International Affairs* 290, 296.

118 The 'second look' doctrine discussed above in Part IIC(1) is consistent with such an analysis.

One option would be to preserve arbitration for consumer transactions, but amend the current legislative model that is designed for international commercial disputes. A Belgian scholar has suggested that the *UNCITRAL Model Law* (as representative of national standards on arbitration) could be adapted to accommodate the unique status of consumers.[119] While many provisions of the *Model Law* could be retained for consumer disputes — such as the obligation of arbitrator impartiality, the duty to accord the parties natural justice, and the obligation on arbitrators to provide reasons for decisions — other provisions would need to be altered.

First, art 1 of the *UNCITRAL Model Law* should be amended to provide expressly for 'consumer arbitration', to avoid arguments about arbitrability. Next, the definition of 'arbitration agreement' in art 7 of the *Model Law* should be changed to provide that only 'post-dispute' arbitration agreements are valid in consumer transactions, to ensure that proper consent to arbitrate from the consumer is obtained. Further, the arbitration agreement must be separate and distinct from any other provisions to prevent confusion. Finally, the agreements must include a 'litigation waiver', whereby each party expressly renounces its right to a court decision on the merits.[120] The purpose behind such proposed amendments is to protect the consumer from being forced into a one-sided agreement with consequences of which the consumer is inadequately aware. According to this view, because consumers are usually only 'one-shot players' their weaker bargaining position and (in most cases) lack of financial resources make them susceptible to exploitation.[121]

A key element in the above proposal is that a consumer should only be bound by a 'post-dispute' arbitration clause — that is, a provision that gives him or her the choice to arbitrate *after* a dispute has arisen.[122] A pre-dispute arbitration clause, by contrast, is a term included in the parties' original agreement that is intended to apply to disputes that may arise in the future. The arbitration clauses so far considered in this article in the UK, US, Canada and the EU have all been 'pre-dispute' clauses. What would be the status of a post-dispute arbitration clause? While UK and EU law does not directly address the validity of such clauses, the fact that in all cases where a consumer arbitration clause has been invalidated, it has been a pre-dispute clause suggests that a post-dispute provision would be upheld. The reason for this conclusion is that in such cases the problems of lack of consent and discrepancy of bargaining power, while not entirely absent, are much diminished. Significantly, the recent EU *ADR Directive*[123] expressly prohibits in art 10(1) pre-dispute clauses. It is also relevant to note that New Zealand, in s 11 of the *Arbitration Act 1996* (NZ), requires that for a consumer arbitration clause to be enforced, it must be entered into after the dispute has arisen and the consumer must have certified that he or she has read the agreement. Similarly, in Japan, art 3 of the Supplementary Provisions to the

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119 Maud Piers, 'Consumer Arbitration and European Private Law: A Seminal Consumer Arbitration Model for Europe?' (2013) 21(1) *European Review of Private Law* 247.

120 Ibid 266.

121 Ibid 286.

122 Note that such a clause is not the same as a clause that merely uses optional language. For example, 'a party may refer a dispute to arbitration' has consistently been interpreted by the courts to be a compulsory arbitration clause once triggered by a party seeking its enforcement: see *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301.

123 *Directive 2013/11/EU of the European Parliament and Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes* [2013] OJ L 165/63.

Arbitration Law 2003 (Japan) provides that a consumer may unilaterally cancel an arbitration agreement entered into with a business for the submission of future disputes to arbitration.

So, for Australian lawmakers, a possible pathway to salvaging consumer arbitration would be to require post-dispute agreements. But, even if enacted into law, would such a requirement be workable in practice? Some US commentators have been highly critical of suggestions to introduce mandatory post-dispute arbitration clauses. In their view, traders would not adopt them in their drafting and would simply refuse to engage in business with consumers from countries where such rules existed or alternatively would increase the prices for such transactions as a 'trade off' for such regulation.[124] The accuracy of such a prediction is debatable, but the risk that consumers will be deprived of goods and services through excessive regulation at least needs to be acknowledged. Moreover, since achieving an international agreement on consumer arbitration would likely be impossible in the face of US intransigence on the issue, other options should be examined.

A further possibility to consider would be online dispute resolution or 'ODR'. ODR is a process whereby a substantial part of the dispute resolution process takes place electronically and may include negotiation, mediation and arbitration. Supporters of ODR technology cite time and cost advantages, as well as less scope for intimidation of vulnerable parties such as consumers with increased access to information.[125] UNCITRAL spent seven years examining the feasibility of creating international rules for online dispute resolution for low value, cross-border disputes. Ultimately, no final agreement was reached due to 'fundamental differences between States that allowed binding pre-dispute agreements to arbitrate and others [who did not]',[126] but a set of draft procedural rules for resolving disputes were produced that could provide some guidance for countries such as Australia. The members of the UNCITRAL Working Group also recognised that, for a complete 'ODR package', principles on applicable substantive law and cross-border enforcement would have to be developed.

The draft procedural rules create a multi-tiered dispute resolution procedure that commences with negotiation, which, if unsuccessful, moves directly to arbitration or alternatively, mediation and then arbitration. The Rules regulate how the proceedings are commenced, conducted, decided and terminated, including

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[124] See Brand, above n 66; Amy J Schmitz, 'American Exceptionalism in Consumer Arbitration' (2012) 10(1) *Loyola University of Chicago International Law Review* 81, 101.

[125] Anthony John Sissian, 'Online Dispute Resolution: The Advantages, Disadvantages, and the Way Forward' (2014) 42(6) *Australian Business Law Review* 445, 446–7; Schmitz, above n 124.

[126] UNCITRAL Working Group III, *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules*, 31st sess, A/CN.9/WG.III/WP.133, [8]. Although no agreement was reached on the issue, the Working Group did, however, acknowledge that '[c]lear and adequate notice of any dispute resolution agreement should be given to make it plain to the consumer what obligations he/she will be taking on and the implications of any choice of law being made'. Further, 'such an agreement should be separate from the main provisions of the contract to better draw the consumer's attention to it': UNCITRAL Working Group III, *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Further Issues for Consideration in the Conception of a Global ODR Framework*, 25th sess, A/CN.9/WG.III/WP.113, [16].

matters such as how adjudicators are to be appointed and challenged and the costs of proceedings.[127]

In terms of substantive legal principles for resolving B2C disputes, the Working Group noted that consumers are currently deterred from seeking redress in cross-border cases due to prohibitive costs, which is where ODR could make a significant contribution. In resolving ODR disputes involving consumers, it would be important to develop a set of principles based on equitable considerations, codes of conduct and internationally recognised principles of consumer protection law for deciding cases. The aim is to avoid complex issues involving applicable law.

On the question of cross-border enforcement, the Working Group queried whether the *New York Convention* would apply to enforcement of online arbitral awards involving consumers. Further, given the low value of such transactions, '[m]echanisms aimed at self-compliance' such as credit card chargebacks, trustmarks, reputation management systems and escrow systems may in any case be 'the most effective means of ensuring enforcement'.[128]

From the perspective of an Australian consumer transacting with a foreign trader, ODR may overcome the problem mentioned above whereby a consumer is forced to conduct dispute resolution in a distant country at high cost and inconvenience with potentially hostile laws for consumers.

The EU has also introduced a regulation on ODR for consumer disputes, which entered into force in January 2016. Pursuant to the regulation, an ODR Platform has been established for the settlement of disputes between EU consumers and traders for both domestic and cross-border online purchases. Disputes are channelled through accredited alternative dispute resolution ('ADR') bodies in the EU member states that are connected to the Platform. All online traders who sell goods, services or digital content to consumers via the trader's website within the EU must provide a link to the ODR Platform on their site that is easily accessible to consumers. Traders must also inform consumers of the existence of the ODR Platform and certified ADR provider and the possibility of using the Platform to resolve disputes. Yet, the weakness of this system is that traders are not obliged to use ODR; their only obligation is to notify consumers of the existence of the Platform.[129]

An important question, therefore, is whether an ODR process similar to that suggested by UNCITRAL, if it were to become operational, would be compliant

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127 UNCITRAL Working Group III, *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules*, 31st sess, A/CN.9/WG.III/WP.133, pt II.

128 UNCITRAL Working Group III, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Issues for Consideration in the Conception of a Global ODR Framework*, 24th sess, A/CN.9/WG.III/WP.110 [33], [48]–[49].

129 Other commentators have criticised the EU model on the ground that it: (a) insufficiently enforces consumer rights by excessively encouraging compromise of disputes; (b) undermines 'due process values' by denying consumers a public and transparent procedure with appeal rights; and (c) is inefficient because of the need for state supervision: see Horst Eidenmüller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29(2) *Ohio State Journal on Dispute Resolution* 261. Such criticisms, however, could be made of almost any ADR process, yet few would suggest that state courts should be the sole dispute resolution provider, even in B2C matters.

with Australian law. From a technical perspective, there is now no problem with the enforcement of online arbitration agreements under Australian law. Section 3(4) of the *IAA*, added in 2010, provides that the requirement for an arbitral agreement to be in writing is met by an electronic communication where the information contained therein is accessible to be useable for subsequent reference. Similar requirements exist for arbitrations conducted in Australia under ss 7(3), (4) and (5) of the *CAA* (for domestic arbitrations) and arts 7(2), (3) and (4) of the *UNCITRAL Model Law* (for international arbitrations).

Regarding enforcement of foreign and local awards, there is no express definition in the *IAA* that includes both electronic and paper awards. What is required in s 9(1)(a) of the *IAA*, art 35(2) of the *UNCITRAL Model Law* and s 35(2) of the *CAA* is that an applicant for enforcement supply an original copy of the award or a certified copy thereof.

It seems unlikely that an Australian court would refuse to enforce an electronic award. Since 2000, uniform legislation provides that electronic and non-electronic communications are to be treated equally with the aim of facilitating the use of electronic commerce.[130] More specifically, such legislation requires that 'if, by or under a law of this jurisdiction, a person is required to produce a document ... that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document'.[131]

The more difficult and ultimately significant question is whether an ODR-type process would comply with the *ACL* provisions on misleading conduct, unfair terms and consumer guarantees. Regarding unfair terms, much would depend on how the process was presented and explained to the consumer in the online agreement, the costs of the process and the extent to which the procedure allowed scope for assent, input and negotiation by the consumer. In essence, it would be need to be shown that there was no significant imbalance in bargaining power between trader and consumer.

Consistency with the *ACL* provisions on misleading and deceptive conduct and the consumer guarantees will more likely depend on the substantive rules provided for determination of the merits of the dispute. If such rules embody best practice international consumer protection standards at least equivalent to or not significantly less than the *ACL*, then an Australian court may well consider that a consumer would not be prejudiced by losing access to *ACL* rights in a 'foreign' arbitration. If, however, the substantive principles take a more freedom-of-contract type approach that insufficiently recognises the unique status of the consumer, a court may be less willing to compel resort to ODR. In this regard, an amendment to the *ACL* to approve ODR processes that satisfy Australian and/or international standards of consumer protection may be considered.

Australian commentators have proposed a number of 'standard fair terms' of substantive consumer protection that could be required in an ODR scheme. Such terms would include requirements: that the product meets quality and safety

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130 See, eg, *Electronic Transactions Act (Victoria) 2000* (Vic) ss 4(b), (c).
131 Ibid s 10(1).

standards, and is fit for purpose; that the seller be restricted from excluding its liability; that there be terms regarding the consumer's right to retain goods, to obtain a refund and for the protection of the consumer's privacy; and that there be provided inexpensive and fair methods of dispute resolution.[132]

If ODR is to be successful for consumer transactions in Australia,[133] then the above matters will need to be addressed. Otherwise, Australian purchasers may remain at the mercy of foreign (particularly US) sellers.

VI Conclusion

The status of arbitration in contracts between businesses and consumers in Australia remains uncertain, despite such clauses now becoming more common in international transactions.[134] This article has suggested that an Australian consumer would have a number of grounds to resist foreign arbitration under Australian law, particularly in reliance on the consumer guarantee and unfair contract terms provisions of the *ACL*. The comparative experience in North America and the EU is conflicting, with the US opting for a strong pro-arbitration policy, but the EU firmly upholding consumer protection. The Australian position is closer to that of the EU in conferring substantial protections on local consumers in their dealings with foreign traders. Yet, the likely lack of awareness of such rights among consumers, the relatively low value of consumer claims and the significant logistical barriers to consumers in obtaining redress in traditional forums are all possible reasons why foreign arbitration clauses have not been challenged by Australian consumers to date. Consequently, a widely adopted system of online dispute resolution may be the best path forward. To be effective, such a system would require simple procedural rules, a ready enforcement mechanism and consumer-friendly substantive legal principles. Achieving international agreement on such a system has so far proven elusive, but efforts may have to be redoubled if consumers are not to be left stranded.

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[132] Dan Svantesson and Roger Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26(1) *Computer Law and Security Review* 31, 35–6, cited in Malbon, above n 53, 41.

[133] Note that in a recent report, the Productivity Commission recommended that 'Australian governments should establish an independent review of consumer alternative dispute resolution (ADR) mechanisms': *Consumer Law Enforcement and Administration* (March 2017) recommendation 6.2 <http://www.pc.gov.au/inquiries/completed/consumer-law/report/consumer-law.pdf>.

[134] For example, regarding the terms and conditions of Uber, see: Damian Sturzaker and John Oddy, 'Uber's Arbitration Clause is Taking People for a Ride', *Knock Knock. Who's There? A Current Affair! — Marque Lawyers* <http://www.marquelawyers.com.au/assets/marque-update_ubers-arbitration-clause-is-taking-people-for-a-ride.pdf>.