

The Conflict Between Party Autonomy and Consumer Protection: Applying the Public Policy Exception to Arbitral Awards in B2C E- Commerce

Rabbimova Farahbonu Alisherovna

Master of Laws (LL.M.), Tashkent, Uzbekistan

faraxbonu2004@gmail.com

Abstract

The enforcement of arbitral awards in business-to-consumer e-commerce creates a difficult conflict between two legal principles. Arbitration depends on party autonomy and the finality of awards, while consumer law proceeds from the assumption that the consumer is normally the weaker contractual party and therefore requires mandatory protection. The conflict becomes particularly visible when courts review arbitral awards against public policy. Article V(2)(b) of the 1958 New York Convention permits refusal of recognition or enforcement where enforcement would be contrary to the public policy of the enforcing State. Although the Convention intended refusal to remain exceptional, consumer protection rules may enter the enforcement process through this exception or through comparable domestic public-policy review. European case law concerning unfair arbitration clauses illustrates how mandatory consumer rules can require judicial intervention even after arbitration has been completed. This thesis examines the relationship between party autonomy, consumer protection and public policy through the New York Convention, Directive 93/13/EEC and the judgments in *Eco Swiss*, *Mostaza Claro* and *Asturcom*. I argue that public policy remains necessary in B2C arbitration, but its application should depend on a serious violation of mandatory consumer protection and a material effect on the consumer's ability to participate in or defend the claim.

Keywords

international arbitration, consumer arbitration, B2C e-commerce, public policy, New York Convention, party autonomy, consumer protection.

Rabbimova Farahbonu Alisherovna
Huquq magistri (LL.M.), Toshkent, O‘zbekiston
faraxbonu2004@gmail.com

Раббимова Фарахбону Алишеровна
Магистр права (LL.M.), Ташкент, Узбекистан
faraxbonu2004@gmail.com

THESIS

Introduction

International arbitration was developed mainly for disputes between commercial actors. Its basic structure assumes that parties are capable of choosing arbitration, selecting applicable rules and accepting that the resulting award will normally be final. The New York Convention of 1958 reflects this approach. Its principal objective is to facilitate recognition and enforcement of foreign and non-domestic arbitral awards and to prevent national courts from conducting a new examination of the merits.

B2C e-commerce does not fit comfortably into this model. A consumer purchasing goods through an online platform may technically accept an arbitration clause, but acceptance often occurs by clicking a button connected with standard terms that were drafted exclusively by the business. There is usually no negotiation. The value of the transaction can be small, while the arbitration clause may refer disputes to an institution or legal system unfamiliar to the consumer. In such conditions, formal consent and meaningful consent may be different things.

Consumer protection law responds to this inequality through mandatory rules. Directive 93/13/EEC on unfair terms in consumer contracts is a clear European example. Its logic is that contractual freedom cannot justify every term imposed by a professional

seller on a consumer. Arbitration law, however, generally begins from another direction: agreements should be respected and awards should not easily be reopened.

The point where these approaches meet is public policy.

Article V(2)(b) of the New York Convention permits a competent authority to refuse recognition and enforcement when recognition or enforcement would be contrary to the public policy of that country. Unlike the grounds under Article V(1), Article V(2) can also raise issues that the enforcing court considers on its own initiative. The provision therefore operates as a final protective mechanism between international arbitration and the fundamental legal values of the enforcing State.

There is no sufficiently reliable global empirical basis for saying that Article V(2)(b) is invariably the most frequently invoked ground specifically in B2C enforcement proceedings. The more defensible proposition is that public policy becomes especially important where enforcement conflicts with mandatory consumer law. In such cases the court faces a difficult question: how far may it protect the consumer without transforming enforcement proceedings into a second examination of the dispute?

The research question of the present thesis is therefore whether public policy in consumer arbitration functions as a legitimate safety valve or risks becoming a form of backdoor appeal. The analysis first considers the doctrinal relationship between party autonomy and mandatory consumer law. It then examines European case law concerning public policy and consumer arbitration. Finally, criteria are proposed for limiting judicial intervention while preserving meaningful consumer protection.

1. Party Autonomy and the Limits Created by Consumer Law

Party autonomy is one of the central foundations of international commercial arbitration. Gary Born describes international arbitration as a system strongly dependent on consent: the jurisdiction of the tribunal exists because the parties have agreed to

submit their dispute to arbitration. Redfern and Hunter similarly connect arbitration with the freedom of parties to choose a private method of dispute resolution.

Such reasoning is convincing in negotiated commercial relationships. It becomes less obvious in mass online contracting.

A consumer purchasing a product through a website normally does not negotiate dispute resolution provisions. The arbitration agreement may form one paragraph among thousands of words contained in general terms and conditions. A consumer can theoretically refuse the contract, but in practical terms this is not equivalent to bargaining over the arbitration clause. The difference between legal consent and economic choice is therefore important.

This does not mean that consumer arbitration should automatically be considered invalid. Such a conclusion would be too broad. Arbitration and ODR can provide consumers with faster and less expensive dispute resolution than traditional litigation. UNCITRAL's work on online dispute resolution itself developed from recognition that conventional court proceedings are often disproportionate for cross-border low-value electronic transactions.

The difficulty lies elsewhere. Consumer arbitration becomes problematic when party autonomy is used to avoid legal protections that the applicable legal order treats as mandatory.

The European approach is particularly instructive. Directive 93/13 requires Member States to ensure that unfair terms used in consumer contracts do not bind consumers. The Directive proceeds from an inequality of bargaining power and information between seller and consumer. An arbitration clause contained in a standard contract can therefore become subject to unfairness review.

A useful doctrinal starting point is *Eco Swiss China Time Ltd v Benetton International NV*, Case C-126/97. The case was not a consumer dispute. It concerned

competition law and an arbitral award. Yet its significance for the present issue is substantial. The Court of Justice accepted that rules sufficiently fundamental to the European legal order could be relevant when a national court reviewed an arbitral award under its public-policy rules.

Eco Swiss therefore illustrates a broader principle. Arbitration finality does not place an award outside the fundamental mandatory norms of the legal order in which judicial recognition or enforcement is requested.

The later consumer cases developed this reasoning in a more sensitive contractual context.

2. From *Eco Swiss* to *Mostaza Claro* and *Asturcom*

In *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05, a consumer contract contained an arbitration clause. The consumer did not challenge the unfairness of that clause during arbitration but raised the issue when seeking annulment of the award.

A strict understanding of arbitration finality could have produced a simple answer: the objection should have been raised before the arbitrator and was therefore lost.

The Court of Justice took a different position. It held that the national court considering annulment had to examine whether the arbitration agreement was void because it contained an unfair term, even though the consumer had failed to raise the objection during the arbitration.

The reasoning is important because it places substantive consumer protection above a purely procedural understanding of waiver. Directive 93/13 would lose much of its practical effect if an inexperienced consumer could permanently lose mandatory protection simply by failing to understand the legal importance of an arbitration proceeding.

In my view, the result in *Mostaza Claro* is justified. A consumer who does not understand that an arbitration clause may be legally unfair cannot realistically be expected to formulate the relevant objection before an arbitrator. Treating silence as informed waiver in such circumstances would turn formal procedure into a mechanism for avoiding consumer law.

At the same time, the judgment creates a problem for arbitration theory. Once courts may reconsider the validity of the arbitration agreement after an award has been rendered, finality becomes conditional on compliance with external mandatory norms.

That tension became clearer in *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08. An arbitration award against a consumer had become final because the consumer had not participated in the arbitration and had not brought an action to set aside the award within the relevant period. Enforcement was subsequently requested.

The Court of Justice had to reconcile the principle of res judicata with the mandatory character of European consumer protection. It recognized the importance of procedural finality but also treated the protection created by Directive 93/13 as having a status capable of requiring examination by a national enforcement court where domestic procedural rules permitted comparable public-policy review.

The distinction between *Mostaza Claro* and *Asturcom* matters. Consumer protection does not simply erase all procedural rules. Rather, European law requires national procedural systems to give effective protection to mandatory consumer norms within the mechanisms available under domestic law.

Taken together with *Eco Swiss*, the cases demonstrate why public policy is so attractive in consumer arbitration. It creates a legal bridge between the autonomy of arbitration and norms that the State or regional legal order refuses to leave entirely to private agreement.

Yet none of these cases should be inaccurately described as a direct application of Article V(2)(b) of the New York Convention to a foreign B2C award. Their value is doctrinal and comparative. They demonstrate how public-policy reasoning and mandatory EU rules influence judicial control of arbitral awards.

This distinction is especially important in academic writing because otherwise national annulment proceedings, EU consumer law and Convention enforcement risk being mixed into one legal category.

3. Public Policy: Safety Valve or Backdoor Appeal?

Public policy has traditionally been understood narrowly in international arbitration. If every mandatory national rule were automatically part of public policy, the New York Convention's pro-enforcement structure would lose much of its value. An unsuccessful party could simply reformulate an ordinary legal error as a public-policy objection.

The concept should therefore be distinguished from ordinary mandatory law.

A tribunal may incorrectly interpret a contract or even make an error in applying substantive law without necessarily producing an award contrary to public policy. Enforcement review is not an appeal. Albert Jan van den Berg's classic analysis of the New York Convention strongly supports a restrictive understanding of the Convention's refusal mechanisms, while contemporary arbitration scholarship generally accepts that Article V should not become a vehicle for reconsidering the merits.

Consumer disputes complicate this traditional model because some consumer rules are specifically designed to prevent contractual waiver. If an arbitration award gives effect to a contractual arrangement that national law treats as fundamentally unacceptable, refusing all judicial review may undermine the very reason why the consumer rule is mandatory.

Two opposite risks therefore exist.

An excessively narrow approach can make consumer protection ineffective. A company could insert a problematic arbitration clause into standard online terms, obtain an award against a consumer who never meaningfully participated, and then rely on arbitral finality.

An excessively broad approach creates the opposite problem. Courts could re-examine consumer awards whenever they disagree with the tribunal's interpretation of consumer legislation. Public policy would then become a disguised appeal.

I find the second possibility particularly dangerous for international B2C arbitration because unpredictability may be more damaging than strictness. Businesses and consumers can adapt to a clear restrictive rule or a clear protective rule. It is much more difficult to design an arbitration system when an award is formally final but its enforceability depends on an undefined judicial evaluation of consumer fairness in every country.

The answer should therefore lie in the seriousness of the violation rather than merely in the existence of a consumer rule.

A court should distinguish between an incorrect application of consumer law and an outcome that effectively deprives the consumer of a mandatory protection regarded as fundamental by the enforcing legal order.

The reasoning of *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), although arising in a commercial context, is useful by analogy. The U.S. Supreme Court accepted arbitration of statutory claims while emphasizing that arbitration should not operate as a prospective waiver of substantive statutory rights. Similarly, *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 515 U.S. 528 (1995), shows judicial willingness to enforce arbitration agreements while leaving open later scrutiny if the substantive statutory protections are actually diminished.

The principle can be transferred cautiously to consumer arbitration: arbitration itself is not the problem. The problem arises where arbitration becomes a mechanism by which mandatory rights disappear in practice.

Two criteria could make public-policy review more predictable.

The first should be a **fundamentality threshold**. Enforcement should be refused only when the violated consumer rule protects a principle regarded as fundamental in the enforcing legal order, rather than whenever a mandatory provision has arguably been misapplied.

The second should be a **material prejudice threshold**. The violation should have had a real effect on the consumer's consent, participation, defence or substantive legal position. A purely technical irregularity without meaningful prejudice should not justify refusal.

These requirements would preserve public policy as a safety valve without making it a general appellate mechanism.

Conclusion

The conflict between arbitration and consumer protection cannot be resolved simply by choosing one principle over another. Party autonomy remains a legitimate basis of arbitration, including arbitration conducted electronically. Consumer status alone should not invalidate an arbitration agreement or make an award unenforceable. Such a rule would ignore the potential advantages of fast and inexpensive dispute resolution for cross-border e-commerce.

At the same time, the traditional model of international commercial arbitration assumes a degree of bargaining equality that is often absent in B2C transactions. Mandatory consumer law exists precisely because formal contractual consent does not always provide sufficient protection.

Public policy therefore has a necessary function.

The experience of *Eco Swiss*, *Mostaza Claro* and *Asturcom* shows that European law is unwilling to treat arbitral finality as completely independent from fundamental mandatory rules. These cases do not constitute direct applications of Article V(2)(b) to foreign B2C awards, but they show the mechanism through which mandatory norms may influence judicial control of arbitration.

The danger begins when public policy loses its exceptional character. If every disagreement about consumer law permits reconsideration of an award, arbitration ceases to provide meaningful finality.

For this reason, I suggest a two-stage test. A court should ask whether the consumer rule allegedly violated represents a fundamental mandatory protection in the enforcing legal order. It should then determine whether the violation materially affected the consumer's consent, participation or substantive rights. Only where both conditions are satisfied should public-policy refusal normally be available.

Such an approach does not eliminate judicial discretion. Public policy cannot be reduced to a mathematical formula. It can, however, make the boundary between consumer protection and appellate review more visible. In the conditions of the digital economy, this predictability is necessary for both sides of the transaction.

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