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A STUDY ON CONSUMER PROTECTION AGAINST UNFAIR TERMS IN THE PERSONAL LOAN CONTRACT OF IRAQI BANKS

MARWAH SAADI SALEH

Universiti Utara Malaysia

DOCTOR OF PHILOSOPHY

UNIVERSITI UTARA MALAYSIA

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A STUDY ON CONSUMER PROTECTION AGAINST UNFAIR TERMS IN THE PERSONAL LOAN CONTRACT OF IRAQI BANKS

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Universiti Utara Malaysia

A thesis submitted to the Ghazalie Shafie Graduate School of Government in fulfilment of the requirement for the Doctor of Philosophy/Doctor of Law
Universiti Utara Malaysia

Kolej Undang-Undang, Kerajaan dan Pengajian Antarabangsa
(College of Law, Government and International Studies)
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ABSTRACT

The protection of consumers should be the priority of banks in the rendering of their services. The personal loan contract is unfair to the consumer as it entails a standard contract the bank provides. This problem is on the rise consistent with the growing demand for fast loans. To address this issue in Iraq, the government has enacted the Consumer Protection Law 2010 to complement the Iraqi Civil Code 1951. The legal framework is questionable as to whether it protects unfair terms in the standard loan contract. Furthermore, the Central Bank of Iraq has issued guidelines to banks requiring them to be more transparent when dealing with consumers. Unfortunately, several issues have been identified that negatively affect these laws and regulations thus making them unable to protect the borrowers as well as to provide them with a suitable remedy. This research hence aims to examine the consumer protection measures taken against unfair terms in the United Kingdom's laws and to analyze the Iraqi laws governing unfair terms of bank loan contracts. Further, it examines Iraq's institutional role that supports and implements the consumer protection framework and compares the institutional and legal mechanisms of Iraq with that of the UK to learn from their experience. This study, employing a qualitative approach, uses the semi-structured interview method to generate data from banks, legal academics, lawyers, judges, and consumers. It also performs doctrinal legal research to support the findings. This study found that the UK adopts the good faith principle, enhanced transparency, fairness, and efficiency in contracting and is proposed as a foundation for the institutional and legal system. This research uncovered a severe deficiency in the Iraqi legislation framework which is limited to what is known as contract adhesion. This study recommends that Iraqi laws need to be amended according to the UK model to provide comprehensive consumer protection. The Iraqi authority should consider the Iraqi institutions' role in coordinating with each other and offering solutions to these issues. The suggestions need to be taken seriously by the Iraqi authority to protect consumers from unfair terms in personal loan contracts.

Keywords: Consumer Protection, Unfair Terms, Personal Loan Contract, Bank, Legal and Institutional Regulations.

ABSTRAK

Perlindungan pengguna harus menjadi keutamaan bank dalam penyampaian perkhidmatan mereka. Kontrak pinjaman peribadi adalah tidak adil kepada pengguna kerana ia merupakan kontrak standard yang disediakan oleh pihak bank. Masalah ini semakin meruncing sejajar dengan permintaan yang semakin meningkat untuk pinjaman mudah. Bagi menangani isu ini di Iraq, kerajaan telah menggubal Undang-undang Perlindungan Pengguna 2010 bagi melengkapi Kanun Sivil Iraq 1951. Kerangka undang-undang ini meragukan dalam aspek perlindungan yang diberikan menerusi terma-terma yang tidak adil dalam kontrak pinjaman standard. Tambahan lagi, Bank Negara Iraq telah mengeluarkan garis panduan kepada bank-bank agar lebih telus ketika berurusan dengan pengguna. Malangnya, beberapa isu telah dikenalpasti yang menjejaskan undang-undang dan peraturan tersebut yang menyebabkan peminjam tidak dapat dilindungi daripada terma-terma yang tidak adil selain kesukaran menyediakan penyelesaian yang bersesuaian. Kajian ini justeru mengkaji langkah-langkah perlindungan pengguna menerusi terma-terma yang tidak adil dalam undang-undang United Kingdom serta menganalisis undang-undang Iraq yang mentadbir kontrak pinjaman bank yang tidak adil. Kajian ini juga mengkaji peranan institusi Iraq dalam menyokong dan melaksanakan kerangka perlindungan pengguna serta membandingkan mekanisme-mekanisme institusi dan undang-undang Iraq dengan United Kingdom untuk belajar daripada pengalaman mereka. Kajian ini, menerusi pendekatan kualitatif, menggunakan kaedah temubual separa berstruktur untuk mendapatkan data dari bank, ahli-ahli akademik perundangan, peguam, hakim dan pengguna. Kajian ini menjalankan penyelidikan undang-undang doktrinal untuk menyokong dapatan kajian. Kajian ini mendapati bahawa UK menggunapakai prinsip kepercayaan, ketelusan yang dipertingkatkan, keadilan dan kecekapan dalam penyediaan kontrak dan dicadangkan menjadi asas bagi sistem institusi dan undang-undang. Kajian ini mendapati kelemahan yang serius dalam rangka perundangan Iraq yang dikenali sebagai kontrak lekatan. Kajian ini mencadangkan agar undang-undang Iraq perlu dipinda mengikut model UK untuk memberi perlindungan yang komprehensif kepada pihak yang lebih lemah daripada terma yang tidak adil dalam kontrak pinjaman. Pihak berkuasa Iraq perlu secara khusus mempertimbangkan peranan institusi Iraq dalam memastikan keselarasan antara satu sama lain dan kemudian menawarkan penyelesaian kepada isu-isu ini. Cadangan-cadangan ini perlu diambil serius oleh Pihak Berkuasa Iraq untuk melindungi pengguna daripada terma-terma tidak adil dalam kontrak pinjaman peribadi.

Kata Kunci: Perlindungan Pengguna, Terma Tidak Adil, Kontrak Pinjaman Peribadi, Bank, peraturan perundangan dan institusi.

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DECLARATION

I hereby declare that this thesis is based on my original work except for quotations and citations which have been aptly acknowledged. I also declare that it has not been previously or concurrently submitted for any other degrees at Universiti Utara Malaysia or other institutions.

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Consumer Protection Law 2010
Iraqi Banking Law No 94/2004
Iraqi Constitution of 2005
Central Bank of Iraq Law

International Instruments

Consumer Credit (EU Directive) Regulations 2010/1010 (which, in turn, implemented the CCD

UN Guidelines, 1994
Consumer Rights Directive 2011/83/EU (CRD)
Unfair Terms in Consumer Contracts Directive 93/13/EEC

United Kingdom

Consumer Rights Act 2015
Consumer Credit Act 2008
Unfair Contract Terms Act 1977
Unfair Terms in Consumer Contracts Regulations (UTCCR)
Consumer Credit Act 1974
Financial Services and Markets Act 2000

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Aziz v Caixa d'Estalvis de Catalunya, (2013) Case C-415/11, [2013] 3 CMLR 5

Brower v. Gateway 2000, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998)

Trujillo v. Apple Computer, Inc., 578 F. Supp. 2d 979, 992–93 (N.D. Ill. 2008)

African Export-Import Bank v. Shebah Exploration & Production Company [2016] EWHC 311

Fair Trading v First National Bank [2002] 1 AC 481, 490 (Lord Bingham) ('First National Bank')

Office of Fair Trading v Abbey National plc [2009] UKSC 6

Banco Santander SA v. Demba and another (Case C-96/16)

Datuk Joginder Singh v Tara Rajaratnam, [1983] 2 Malayan Law Journal 196

Cortes v. Banco de Sabadell SA (Case C-94/17)

Affin Bank Berhad v Datuk Ahmad Zahid Hamidi, [2005]3 MLJ 361

Saad Bin Marwi v Chan Hwan Hua, [2001] 2 AMR 2010; [2001] 3 CLJ 98

Printing and Numerical Registering Co v Sampson, [1875] LR 19 Eq 462.

Hart v O'Connor, [1985] AC 1000

Khodari v Al Tamimi [2009] EWCA Civ 1109

Barons Finance Ltd. v Lara Basirat Abeni Olubisi [2011] EWCA Civ 1461

Robert Shaw v Nine Regions Limited [2009] EWHC 3514 (QB),

Pelvin v Paragon Personal Finance Ltd

Nine Regions (t/a Logbook Loans) v Sadeer Bromley County Court, Case No: 8QT25415

Nine Regions (t/a Logbook Loans) v Fateh Singh Leeds County Court, Claim No: 8QZ 16394.

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LIST OF ABBREVIATIONS

UK	United Kingdom
SFLPC	Standard Form Personal Loan Contract
BoE	Bank of England
UN	United Nations
CJEU	European Court of Justice
CCA 1974	Consumer Credit Act 1974
CCA 2006	Consumer Credit Act 2006
ICC	Iraqi Civil Code 1951
CBIL	Central Bank of Iraqi Law 2004
IBL	Iraqi Banking Law no 49 of 2004
CPL	Consumer Protection Law 2010
CRA	Consumer Rights Act 2015
UTD	Unfair Terms Directive 93/13/EEC
CBI	Central Bank of Iraq
UCTA	Unfair Contract Terms Act 1977
CMA	Competition Markets Authority
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000.
UBI	United Bank for Investment

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CHAPTER ONE

INTRODUCTION

1.1 Background

Nowadays, we have entered the new millennium where consumer protection is entering a stronger role by ensuring a fair market and society. However, currently some markets have failed to differentiate market categories, although currently the demand for protection will increase. Thus, the government as a legislator needs to balance the interests of the supply market and the interests of consumers. In ensuring fair trade, current consumer protection has also experienced quite rapid development where consumer contracts now have a dominant feature. Thus, the contracts need to own a vehicle through exchange effectively.[1]

In managing the entire process of contracts for the sale of goods and services also selling property, it is required to have contract law because contract law has become the basis of every economic system.[2] The rules in the contract traditionally require a written agreement signed by the parties stated in the contract agreement.

However, these traditional rules are only enforced before facing new challenges by using hardware and software assets in the contract process.[3] In this area, continuous developments in the legality of business standards have been seen. Where, contracts become more complex due to the many fraudulent practices that have been

[1] Azimon Abdul Aziz and Sakina Shaik Ahmad Yusoff, "Regulating Standard Form of Consumer Contracts: The Legal Treatment of Selected Asian Jurisdictions," Asian Journal of Accounting and Governance 1, no. 1 (2010): 105–24, https://doi.org/10.17576/ajag-2010-1-6548.

[2] Rachagan Sothi, "Protection against Unfair Trade Practices in Malaysia - Law, Enforcement, and Redress in a Developing Country," *Journal of Consumer Policy* 15, no. 3 (1992): 255–74, https://doi.org/10.1007/BF01017576.

[3] Linda Mulcahy, *Contract Law in Perspective*, 5th ed. (Routledge-Cavendish, 2008).

developed by influential parties who exploit weaker parties where they are less aware of consumer rights. Often, the first is to inflate certain exclusions and limitations of the liability clause. Therefore this, will provide the bidder with an adequate level of protection against certain risks that may occur in the contract. It is these clauses that are widely used in consumer contracts.[4]

With the increasing speed and complexity of transactions in today's more modern economy, it will make it impossible to avoid new types of contracts from standard mass contracts, in companies with large production and distribution scales.[5] With this model of transactions, sophisticated commercial companies have formulated and imposed their favourite contract terms on parties with less ability to negotiate.[6] This in turn allow corporations to modify unilaterally negotiated contractual arrangement with an incorporated contract pool towards which they could eventually consider and manage their business hazards.[7]

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A theory which states that the parties have equal bargaining power to protect their interests, or which relies on the perception that the parties to a contract are independent entities, this theory is called the theory of freedom contract. Where the theory is no longer justified in commercial practice. As one commentator noted, in the commercial and consumer marketplaces, the gap that exists in the freedom of the

[4] Veljko Trivun, Vedad Silajdžić, and Fatima Mahmutćehajić, "Exclusion and Limitation of Liability Clauses in Electronic Contracts," in *The Fourth International Conference on ECONOMICS AND MANAGEMENT OF NETWORKS EMNet* (Vienna: School of Economics and Business, University of Sarajevo, 2010), https://emnet.univie.ac.at/uploads/media/Trivun_Silajdzic_Mahmutcehajic_01.pdf.

[5] Friedrich Kessler, "Contracts of Adhesion--Some Thoughts about Freedom of Contract," *Columbia Law Review* 43, no. 5 (1943): 629, https://doi.org/10.2307/1117230.

[6] David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power," *The Harvard Law Review Association* 34, no. 3 (1971): 529–66, https://www.jstor.org/stable/pdf/1339552.pdf.

[7] Carolyn Edwards, "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues," *Marquette University Law School* 77, no. 3 (2009), http://scholarship.law.marquette.edu/facpubhttp://scholarship.law.marquette.edu/facpub/281.

contract regime between theoretical foundations and the dominant practice has made the increased absurdity of continuous commitment to freedom of contract as a regulatory principle.[8]

The usage of standard form contracts can be considered an economically reasonable and efficacious channel of doing business. This is because they are considered as the least-expensive instrument for transactions with repeat dealers, but it is also entirely correlated with a real disparity of bargaining power.[9] This shift occurred as a result of the necessity for consumer protection against certain institutions' exploitation of the "take-it-or-leave-it" approach in their commercial dealings with certain consumers.[10]

The banking sector is one of the largest fields that practice commercial transactions with consumers. To ease its commercial transactions, the banking sector has been using a standard form.[11] The injustice of economic influence can mean through the definition of hatred in the contracting process and the loss of goodwill.[12]

The engagement of the unprofessional (customer) to the professional's conditions (bank) is confirmed by the bank's legal experience in formulating the topic of the phrase or its effect [13] coupled with the economic influence and superiority in technology leads to huge feature for the bank. When a consumer in this position

[8] Daniel D Barnhizer, "Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract-Symposium Introduction," *Michigan Street Law Review* 841 (2006): 841, https://doi.org/none.

[9] Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords," *The University of Toronto Law Journal* 26, no. 4 (1976): 1–24, https://www.jstor.org/stable/pdf/825547.pdf?acceptTC=true.

[10] Edith Warkentine, "Beyond Unconscionability: The Case for Using Knowing Assent as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts," *Seattle Universty Law Review* 31, no. 469 (2008).

[11] Kessler, "Contracts of Adhesion--Some Thoughts about Freedom of Contract."

[12] Noor Mahinar, Noor Hashimah, and Razali Siti Salwani, "Consumer Rights Act 2015 (United Kingdom): Is It a Good Model in Protecting Banking Consumers from Unfair Terms in Islamic Banking Consumer Contracts in Malaysia?," *JUUM* 22 (2018): 22–31, https://doi.org/10.17576/juum-2018-22-03.

[13] Hugh Collins, "Good Faith in European Contract Law," Oxford Journal of Legal Studies 14, no. 2 (1994): 229–54, https://doi.org/10.1093/ojls/14.2.229.

needs money or service from bank with its simple experience. As a result, the consumer will have falsely accepted the contract's conclusion. In addition, the existing legislation are outdated and does not support the weak position of bank consumer.[14]

A condition that runs counter to the good faith prerequisite of the contract is considered unfair, and it results in material disparity in the rights and obligations entailed by the contract at the expense of the customer. Generally, in a standard form loan contract, conditions and terms are prewritten[15], without negotiation with the borrower, and some essential terms are considered as unfair terms because it forces the consumer in the cases such as; (i) pre-fund[16] performance of the loan, (ii) the total amount of the cost of each specific loan, and (iii) the loan repayment period. Furthermore, a consumer loan has the magnitude of the guarantees given to a lender contract, as well as the imposition of expensive compensation at non-implementation of a borrower obligations.[17]

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In Iraq, the banking sector is developing in terms of number and service provided,[18] however, the law is yet to be developed in such a manner to guarantee protection of consumers of financial services against imposition of standard loan contract provided

[14] Dahlia Zamel, "Secured Lending Transactions in Iraq: Defining Market Practice in a Volatile Environment," *Banking Law Newsletter*, 2014.

[15] Alexandra Sims, "Unfair Contract Terms: A New Dawn In Australia And New Zealand?," *Monash University Law Reviw* 39 (2012): 739, http://www.consumeraffairs.govt.nz/pdf-library/.

[16] Allocate or provide funds for a loan.

[17] Craig L Arsenault, Hilary A Findlay, and Craig Arsenault, "Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations: A Case of Athlete Agreements" (Brock University, 2013), http://dr.library.brocku.ca/bitstream/handle/10464/5048/Brock_Arsenault_Craig_2013%281%29.pdf?sequence=1&isAllowed=y.

[18] Ammar Khalaf, "A Note on the Soundness of Iraqi Commercial Banking System," *Vinimaya* 32, no. 2 (2012), https://www.researchgate.net/publication/329948876_A_Note_on_the_Soundness_of_Iraqi_Commercial_Banking_System; Ammar Hamad Khalaf and Azhar Hassan Ali, "Financial Inclusion and Economic Development in Iraq," *International Journal of Science and Research (IJSR)*, no. December 2018 (2017), https://doi.org/10.21275/ART20177491.

by banks.[19] Consumer rights are not supported by Iraqi contract law, particularly when it comes to standard form contracts and fairness clauses in consumer contracts made by merchants. Therefore, there might be a need for legal oversight in this sector, particularly with regard to how businesses and dealers behave in their contractual interactions with customers.[20]

As stated before, that the legislature in Iraq has yet to address the issue of injustice, both in consumer protection laws and other laws, so a situation like this will require a comprehensive set of rules that can influence consumer decisions.[21]

Firms or traders can take advantage of this hazy situation by incorporating terms that limit their legal obligation into business transactions.[22]. Due to this gap, banks and other businesses are able to impose terms and conditions, processes, or other "turnstiles" with little to no regulation, which may put additional demands on customers and other businesses.[23]

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[19] Latfe Jabar, "Funding and Financial Reform Process in Iraq," *International Journal of Advances in Management and Economics IJAME* 5, no. 6 (2018), http://managementjournal.info/index.php/IJAME/article/view/62/62; Ammar Hamad Khalaf and Azhar Hassan Ali, "Financial Inclusion and Economic Development in Iraq," *International Journal of Science and Research (IJSR)*, no. December 2018 (2017), https://doi.org/10.21275/ART20177491.

[20] Zkry Mohammed and Nasir Cactus, "Civil Protection of the Familiar Conditions in Commercial Contracts," *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 1, no. 1 (2009): 45–88, https://www.iasj.net/iasj?func=fulltext&aId=37004.

[21] Umkalthoom Sabeeh, "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract," *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91, https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan; "The Legal Rules in the Handling of Unfair Terms" (University of Karbala, 2015), http://law.uokerbala.edu.iq/wp/wp-content/uploads/2015/02/images_pdf-mesg_4.pdf.

[22] Ali Abdullah, "The Legal Protection of the Weak Party in the Contractual Relation," *Route Educational & Social Science Journal* 6, no. 5 (2019): 376–404, https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.

[23] Muhammad Fawwaz, "The Unfairness in the Adhesion Contract," *Journal of Anbar Uneversity for Economic and Legal Sciences* 2, no. 13 (2017): 189–211, https://www.iasj.net/iasj?func=fulltext&aId=132582.

1.2 Problem Statement

From the above discussion, the researcher discovered three gaps that require further scrutiny. The first gap is the unequal bargaining power under the new contract model (standard form contract). The law of contract is the invisible situation in which transactions are carried-out between consumer and business. One of the areas in which the law is tested is under such a scenario in which contract terms are presented to business or the consumer, but they have little negotiation opportunity.[24]

Nowadays, there is imperfection in almost all contracts and in most instances the negotiation in those contracts is not fully exercised. While entering into the contract, the parties are only vaguely aware of its provisions. Often, the content of the contract only come to their understanding through the communications that reached them after the contract, and in some instances with persons not initially part of the agreement. These widely acknowledged realities about the typical contractual process are quite disturbing and upsetting, because they are contrary to the classical picture of contract. Consumer durables make standard form contracts the prominent tool of contracting.[25]

Recent contract law arises as courts commence to realize the existence of disparity between contracting parties, in which one side was compelled to enter into agreement because of social factors, economic pressures, or both.[26] The increasing realization of this contracting disparity was attributed to the emergence of standard form

[24] Sakina Shaik and Farhah Abdullah, "Legislative Intervention in Exclusionary Liabilities in Consumer Contracts in Malaysia," *Jurnal Undang-Undang Dan Masyarakat* 22, no. 0 (2018): 33–40.
[25] Ibid.

[26] Jesse Elvin, "The Application of the Unfair Terms in Consumer Contracts Regulations 1999 Terms in Consumer Contracts," *King's Law Journal* 5768, no. December (2017): 39_63, https://doi.org/10.1080/09615768.2003.11427561; Sims, "Unfair Contract Terms: A New Dawn In Australia And New Zealand?"

contracts.[27] Unfair bargaining power is a well-known legal concept. They are frequently referenced in contracts with consumers. Despite the warning, the problems brought on by unfair bargaining power are frequently ignored in business contracts. These inequalities are frequently determined by the parties to the contract.[28]

For commentators, the presence or otherwise of bargaining power is commonly assessed based on four vital criteria: (1) bargaining attitude (e.g., demonstrating standardized forms based on a take-it-or-leave-it base, application of hard negotiation tactics, etc.); (2) characteristics/profile of the seller such as status of monopoly, size, and sophistication; (3) characteristics/profiles of buyer such as income level education, and gender; and (4) such as necessity or a lack of the contract's subject matter are characteristics or elements of the transactions.[29]

In Iraq, the concept of freedom of contract (old model) is still predominant along with the existence of old regulation that protects the superiority of contract power. In particular, the contracting process between parties in Article 1 is governed by the Iraqi Civil Code No 40 of 1951 (ICC 1951): "If the contract has been signed, the agreement becomes legally bound, and no party can revoke it and no one can change it unless required by law or the agreement of the other party."

[27] Elvin, "The Application of the Unfair Terms in Consumer Contracts Regulations 1999 Terms in Consumer Contracts"; Sims, "Unfair Contract Terms: A New Dawn In Australia And New Zealand?"
[28] Ali Abdullah, "The Legal Protection of the Weak Party in the Contractual Relation," *Route Educational & Social Science Journal* 6, no. 5 (2019): 376–404, https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.
[29] Daniel Barnhizer et al., "Bargaining Power in Contract Theory, Visions of Contract Theory: Rationality, Bargaining and Interpretation," *Carolina Academic Press* 3, no. 4 (2007): 85–148, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=578578; Barnhizer, "Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract-Symposium Introduction."

This justifies that parties are free to put terms and conditions that ensure their rights and to set the obligations upon them[30]. Hence, the absence of laws in areas of consumers' interest also creates ambiguity[31]. Consumer loans in Iraq have no specific regulations on consumer protection for financial services. Even though the banking law contains confidentiality and privacy provisions for banking institutions and financial institutions.[32]. Recently, the concept of bargaining power is developed in favour of strong party, beside that there is no academic attention for this concept to get government attention to take necessary steps to protect loan consumer.

The second issue is the use of standard form contract by the banking sector in issuing personal loan contract for consumers. In 1943, Friedrich Kessler acknowledged growth in standardized mass contracts. Once the content of a standardized contract is formulated by a business firm, the content can be applied in every transaction with the similar service. Today's standard contract is a clear reflection of market's personality. The attainment of its utmost integration has been made in the various form of contracts exercised on innumerable exchanges. Upon discovery and perfection of the advantage of these contracts in financial services such as banking business, conveyance and insurance, it application spread across all other areas of extensive enterprise.[33]

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[30] Mohammed Abdul-Razaq, "Interpretation of the Party's Interest Doubt," *Risalat Al-Huquq Journal* 3, no. 3 (2011): 152–63, https://www.iasj.net/iasj?func=fulltext&aId=42458.
[31] Zamel, "Secured Lending Transactions in Iraq: Defining Market Practice in a Volatile Environment"; Abu Bakar Noor Mahinar et al., "Extending Unfair Contract Terms Protection To Banking Consumers in Malaysia : The Case of Islamic Banks," International Journal of Accounting, Finance and Business 3, no. 8 (2018): 22–32.
[32] Teymour Abdel Aziz and Peter McConaghy, "Promoting Financial Inclusion for Growth and Development in Iraq," *World Bank (MENA Knowledge and Learning*, vol. 116, 2014, https://openknowledge.worldbank.org/bitstream/handle/10986/18154/875490BRI0QN110VC000knowledge0notes.pdf?sequence=; World Bank Group, "Iraq Economic Monitor," 2018.
[33] Kessler, "Contracts of Adhesion--Some Thoughts about Freedom of Contract."

The form of the standard contract is expected to be able to ease more than 99% of all contracts currently made[34]. The main basis for establishing legal authority over unfair terms and practices is that they significantly distort the rights and obligations of the parties under the contract to the detriment of consumers.[35]

In line with this, there are several strategies that have been carried out by international and national organizations to help the government, which is by issuing general rules that can be used as a first step towards codification and unification of laws that can protect all consumers with equal protection. Given this, it is essential for the government to create and implement regulations to ensure that the market operates on the principles of informational transparency, uniformity of implementation tools, equality of consumer and business interests, and sufficiency of redress mechanisms. [36] Like what happened in the UK when the government announced the bodies that carrying out consumer functions. For instance, transferring responsibility for the enforcement of consumer legislation to the new Competition Markets Authority (CMA) and Trading Standards. It is the duty of the Trading Standards to prevent an unfair trading practice in the areas of selling practices, promotion and advertisement for instance, while the CMA has the duty of enforcing, unfair ticket terms and conditions.[37]

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[34] Hugh Collins, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Netherlands: Kluwer Law International, 2008), https://books.google.com.my/books?id=I1R4E0gkzNwC&dq=consumer+protection+in+loan+contract+in+uk&source=gbs_navlinks_s.

[35] Shaik and Abdullah, "Legislative Intervention in Exclusionary Liabilities in Consumer Contracts in Malaysia."

[36] Paula Giliker, "The Consumer Rights Act 2015 a Bastion of European Consumer Rights?," *University of Bristol* 37 (2016): 78–102, https://doi.org/10.1111/lest.12139/abstract.

[37] Sarah Brown, "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law," *Legal Studies* 36, no. 2 (2016): 230–57, https://doi.org/10.1111/lest.12100.

Nonetheless, the standard form contract, as claimed by many Iraqi scholars.[38] The standard form contract is frequently used by businesses and traders as well as by formal and informal organizations, such as in contracts for energy, water, and the internet. This compliance is related to the market's innovative approach to cost-cutting and contract term and condition setting that promotes corporate advantage. The insufficient role of law also contributed to this problem. [39]

As previously said, adhesion, which is characterized as a non-negotiable, differs from the standard form contract, which is the product of technological and economic development. One side creates the complete contract, and the other does not have the authority to discuss or amend it. The Iraqi legislature already regulates adhesion contracts in the ICC 1951. There are just two provisions in the aforementioned statute for this purpose, Articles 166 and 167. Article 166 specifies that "doubt will be construed to the debtor's benefit," and Article 167 deals with the adhesion contract and states that where unfair terms exist in this contract, the court will determine against such unfairness in accordance with its fairness and justice standards.

Therefore, these two articles must be replaced in order to provide comprehensive protection to consumers.[40] According to the of Jurisprudence, states that the legal framework in the

[38] Suleiman Barak, "Consumer Protection from Arbitrary Terms," paper presented at the legal meeting of the baytalhikma scientific institution, Iraq, 2015, http://www.baytalhikma.iq/News_Details.php?ID=308; Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power"; Hasan Moosa, Ahmed Hshem, and Muthanna Mashaf, "Commitment to Warn in Consumption Contracts," *Journal Of the College of Law /Al-Nahrain University* 19, no. 2 (2017): 155–80, http://theses.gla.ac.uk/5452/.

[39] Jabar, "Funding and Financial Reform Process in Iraq"; Yuk-shee Chan and George Kanatas, "Asymmetric Valuations and the Role of Collateral in Loan Agreements," *Journal of Money , Credit and Banking* 17, no. 1 (2017): 84–95.

[40] Fawwaz, "The Unfairness in the Adhesion Contract"; Abdul-Razaq, "Interpretation of the Party's Interest Doubt"; Sabeeh, "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract."

State of Iraq is still limited to what is known as Adhesion Contracts[41], A contract is said to be an Adhesion contract if the contract is attached to the subject or physical monopoly over a commodity or facility[42]. Adhesion's contracts theory could not be able for consumer protection against abusive terms because, in many cases, adhesion conditions no longer apply. In addition, Article 167 grants the judge broad discretion in removing unfair terms from an adhesion contract. The present researcher contends that this authority can be interpreted differently by various judges. Hence, there is a call for a "blacklist" or "grey list"[43] A terms system that enhances transactions in developing nations, particularly those involving unfair terms.[44]

The third issue relates to the unfair terms in the personal loan contract in Iraq and how the law in Iraq and developed countries deal with this problem to protect consumers. Loan contracts is one instance of the standard form era.[45] Banking sectors are used to providing a printed form contract to the borrower.[46] These forms of contracts, such as lending and tenancy agreements, have always featured "some element of inequality," according to Angelo and Erlanger.[47]" Because the nature of loan agreements allows for difference between parties, unfavourable terms are likely. As a result, many countries impose severe legal limits and controls on standard form contracts in general, and loan agreements in particular. In order to safeguard the

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[41] Swalum Sofian, "Legal Protection to the Contracting Parties from Arbitrary Terms in the Algerian Legislation," *Journal of In-Depth Legal Research Generation*, no. 4 (2016); Sabeeh, "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract"; Fawwaz, "The Unfairness in the Adhesion Contract."

[42] Muhammad Ali, *Civil and Judicial Protection for the Consumer of the Unfair Terms Comparative Study*, 1st ed. (Egypt: Center of Arabic Studies, 2018), http://sdr.shjlib.gov.ae:8080/pubs/alhimayat_almadaniat_walqadayiyat_lilmustahlik_min_alshurut/78/.

[43] The 'grey list' is an indicative and non-exhaustive list of terms in consumer contracts which may be regarded as unfair.

[44] Sims, Alexandra. "Unfair Contract Terms: A New Dawn In Australia And New Zealand?" *Monash University Law Reviw* 39 (2012): 739. http://www.consumeraffairs.govt.nz/pdf-library/.

[45] Kessler, Friedrich. "Contracts of Adhesion--Some Thoughts about Freedom of Contract." *Columbia Law Review* 43, no. 5 (1943): 629. https://doi.org/10.2307/1117230.

[46] Ibid.

[47] A H Angelo and E P Ellinger, "Unconscionable Contracts : A Comparative Study of the Approaches in England , France , Germany , and the United States Unconscionable Contracts : A Comparative Study of the Approaches in England ," *Loyola of Los Angeles International and Comparative Law Review* 14, no. 3 (1992): 455.

weaker party in a contract that has already been established by one party, they also control the introduction of unfair terms.[48]

Today, the economic development and community transformation reflect the lives of individuals, and through the traditions of consumption pattern a new multi-consumer need appeared. Loans have become a common means to meet customers' needs because of the limited purchasing power of broad categories of society, and loan is also a speedy way to cover urgent expenses terms.[49] Hence economically, loans can contribute immensely to increased production, circulation of goods, and various mechanisms.[50]

In Iraq, the level of socioeconomic development is still characterized by an extreme deprivation. About 25% of Iraq's population live below the poverty line, which means they live on less than two dollar ($2) per day. The case of poverty in Iraq, is advanced in rural areas and differs regionally with relatively higher poverty rates in the southern and central governorates, when compared to the Kurdish governorates. The increased poverty rate by 3.3% is linked to the high unemployment rate of about 9.9% in the year 2018,[51] rampant corruption, and a decline in education level.[52] The literacy rate for both sexes was about 87.2% in the year 2018, with an illiteracy rate of almost 47% for women. Only about 52.9% of both sexes attended or have access to secondary schools, and 16.4% to tertiary education.[53]

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[48] Edwards, Carolyn. "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues." *Marquette University Law School* 77, no. 3 (2009). http://scholarship.law.marquette.edu/facpubhttp://scholarship.law.marquette.edu/facpub/281.

[49] Rahman Hasan, "The Role of Banking Loans (Housing Loans) to Solve Housing Crisis (Wasit Province Case Study)," *Kut Journalfor Economic and Administrative Sciences* 16 (2014).

[50] Aboalqor Rafiqa, "Commitment to Inform Customer in the Realm of Bank Loans," *Legal and Political Journal*, no. 12 (2018): 11–24.

[51] World Bank, "Iraq Overview," World bank in Iraq, 2019, https://www.worldbank.org/en/country/iraq/overview.

[52] Ibid.

[53] Ammar Hamad Khalaf and Azhar Hassan Ali, "Financial Inclusion and Economic Development in Iraq," *International Journal of Science and Research (IJSR)*, no. December 2018 (2017), https://doi.org/10.21275/ART20177491.

After 2003, wars and international economic crises imposed critical financial situation on the people in Iraq. Years of violence and political instability have (1) adversely impeded the robust development of a private sector, (2) destroyed institutions and infrastructure (3) results in serious challenges in employment creation.[54] This situation seriously affect access to financial services and eventually the household welfare. Because high access to formal financial services such as savings, insurance and credits by individuals is critical towards improving household welfare, which in turn, can spur economic activity and help manage economic shocks.[55]

With the above conditions, individuals are compelled to opt for an easy way to get money. One choice is from banks, which offer loans with attractive interest prices and easy procedures in order to engage consumers.[56] However, the process often includes risky and hidden terms that can harm the borrower's interests at the contract performance.[57] Dr. Abdul-Hussein Muwaffaq[58] said in an interview that a higher interest rate can overburden a borrower. Additionally, Hussein Ali al-Hamdani mentions that the operation of loan award is unstable because the banks in Iraq are different in terms of interest rate. Often the rates are quite high, requiring the

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[54] Latfe Jabar, "Funding and Financial Reform Process in Iraq," *International Journal of Advances in Management and Economics IJAME* 5, no. 6 (2018), http://managementjournal.info/index.php/IJAME/article/view/62/62"; Ammar Hamad Khalaf, "The Determinates of Financial Development in Iraq," *Econ. Rev* 23, no. 1 (2019): 63–86.

[55] Aziz, Teymour Abdel, and Peter McConaghy. "Promoting Financial Inclusion for Growth and Development in Iraq." *World Bank (MENA Knowledge and Learning*. Vol. 116, 2014. https://openknowledge.worldbank.org/bitstream/handle/10986/18154/875490BRI0QN110VC000knowledge0notes.pdf?sequence=.

[56] Faek Muhmood, "Bank Loan between 'Specific and Consensual' Legal and Comparative Study," *Journal of Alsharja University for Legitimate and Legal Sciences* 11, no. 2 (2014).

[57] Daniel Fischel, Andrew Rosenfield, and Robert Stillman, "The Regulation of Banks and Bank Holding Companies," *Virginia Law Review* 73 (1987): 301, http://chicagounbound.uchicago.edu/journal_articles.

[58] Dean of the Higher Institute of Accounting and Financial Studies at the University of Baghdad said in interview

amendment of existing legislation to regulate the loan terms in order to be consistent with the increasing market demand.[59]

It is necessary to stand at the changing in the interest rates. Based on CBI's statistics, between 2006 and 2016 averaged %14.5. In 2018, the interest rate was 12.74%, 12.88% and 14.04% for long, medium and short-term loans respectively. Notes that it falls within the category of the highest interest rates on loans in the world albeit the inflation rate is low between (-1 - 2.5%) with the stability of the exchange rates.[60] This indicates a high-risk assessment and may not include fundamental factors in the economic sense in determining interest rates and the supply of credit and demand.

The convergence of interest rates on lending for different periods is contrary to theoretical expectation and the international experience. Member of the Board Directors of the Central Bank of Iraq stressed in his study which was conducted in 2018, that the interest rate is high in Iraq.[61] This happens due to high risk or default loans rates 16% and there is no doubt that the operational cost and the characteristics of the banking market or the so-called market power are main factors that explain the high-interest rate.[62] He added that the banks in Iraq have independently different policies in terms of determining the interest rates, services fees, business expenses

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[59] Robert Loony, "Banking on Baghdad : Financial Change in Postwar Iraq," *Center for Contemporary Conflict* 3, no. 5 (2004).

[60] Ahmed Ali, "Banks, Credit and Financial Depth between Iraq and the International Experience," *Journal of Monetary and Financial Studies* 2018, no. 3 (2018), https://cbi.iq/documents/journal of monetary and financial studies. july 2018.pdf.

[61] Ibid.

[62] Khalaf, "The Determinates of Financial Development in Iraq"; Alwattan Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans," economy, 2018, https://www.alwatanvoice.com/arabic/news/2018/10/14/1182464.html.

and management cost[63]. In addition, Iraq has one of the highest spreads between borrowing and lending rates in the Middle East region.[64]

Besides that, the Central Bank of Iraq also has weakness in applying the monetary policy tools. As a result, it exercises no action for the protection of consumer (borrower) from above situation because it does not limit the maximum loan interest rate to be complied by the Iraqi banks. This should be controlled by it in order to protect the misuse of such independence enjoy by banks in putting high interest rate on personal loan.[65]

Nevertheless, the banks also do not allow for their terms and conditions to be discussed with another party; they work on the take-it-or-leave-it concept. For instance, the Credit Bank of Iraq provide loans and other banking service with set of terms and conditions. However, these conditions and terms are non-negotiable, and the bank can change them without any notice by stating that "Any criteria, terms, or conditions may be changed by the bank without prior notification".[66]

In addition, loans and advances often deceive Iraqi citizens and drown them in debt that may stretch to fifteen years, and it may restrict the debtors' freedom on one side. Further, the debtors may pay an interest rate of up to 58% of the loan amount. Often, they are tricked by an announcement of an interest rate that does not exceed 8%. This

[63] Ahmed Ali, "Banks, Credit and Financial Depth between Iraq and the International Experience," *Journal of Monetary and Financial Studies* 2018, no. 3 (2018), https://cbi.iq/documents/journal of monetary and financial studies. july 2018.pdf.

[64] Ibid.

[65] Ibid.

[66] Abozaid Abdulazeem, "Reciprocal Loans in Islmic Finance," *Munich Personal RePEc Archive*, no. 93405 (2019), https://mpra.ub.uni-muenchen.de/93405/1/MPRA_paper_93405.pdf.

rate entices Iraqi citizens and employees because it does not conform to the roof of 12%.[67]

The contradiction or the trick is that the citizen pays 8% interest for each amount he or she borrows annually. Yet in total, the multiple years of instalments and repayments of 8% interest rate (annual) will amount to more than 60% of reimbursement interest that the citizens are unwarily forced to repay. Nowhere in the contract has it mentioned that repayments should be made annually, and that the repayments are applicable for the whole years.[68]

So far, the risk of consumer loans is based on superior standards with unfair terms. Where the risk is based on the adhesion contract.[69] The adhesion contract is a "non-negotiable contract", so the contract cannot be negotiated. Where one party makes a complete contract, and the other party does not have the authority to change and discuss it. So, the only options are to accept the contract in its entirety, comply with all of its terms, or refuse to fully participate in the agreement.[70] The party who enjoy this advantage is able to set terms, whereas the second party, the weaker party, can only be subjected to these unwary conditions.[71]

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[67] Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans"; "Loans and Advances of Rafidain and Rasheed Banks and Conditions for Obtaining Them," Alsumaria News, 2018, https://www.alsumaria.tv/news/195567/alsumaria-news/ar.

[68] Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans"; "Loans and Advances of Rafidain and Rasheed Banks and Conditions for Obtaining Them."

[69] Sofian, "Legal Protection to the Contracting Parties from Arbitrary Terms in the Algerian Legislation"; Noor Mahinar et al., "Extending Unfair Contract Terms Protection To Banking Consumers in Malaysia : The Case of Islamic Banks."

[70] Sabeeh, Umkalthoom. "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract." *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91. https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.

[71] Fawwaz, Muhammad. "The Unfairness in the Adhesion Contract." *Journal of Anbar Uneversity for Economic and Legal Sciences* 2, no. 13 (2017): 189–211. https://www.iasj.net/iasj?func=fulltext&aId=132582.

Hence, problems arise because of the lack of equality of contracting. At the signing of a loan contract, a credit institution often imposes a set of commercial papers called "bill of exchange" and that securities "should be signed by consumer, and these tools have serious consequences on him because it deprives him from any protection.[72]" Consumers who signed the promissory note or bonds has no option for final objection to the performance even in the case of non-implementation.[73]

The International Convention on Contracts in 1951 did not keep pace with the evolution of contract protection laws, the weaker party to a contract (the consumer) and freedom of contract is still the main notion.[74] In the terms of lending process, one of the analyses suggests that the ICC 1951 cannot provide protection against unfair terms in the lending contract. This shows that the contract is like an adhesion contract which is subject to a general role.[75] According to Iraqi scholars, contracts of adhesion are different from contracts of standard forms and new types of contracts.[76] Although the Civil Law of 1951 in Iraq governs adhesion contracts, the standard form contract and new contract forms mostly resulted from economic and technological advancements.

Loan contracts are regulated by ICC 1951 No 40, with articles governing loans in articles 684, 686, 688, and 692. Based on 684 a loan is "where a person gives to

[72] Aboalqor Rafiqa, "Commitment to Inform Customer in the Realm of Bank Loans," *Legal and Political Joumal*, no. 12 (2018): 11–24.

[73] Ibid.

[74] Sabeeh, Umkalthoom. "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract." *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91. https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.

[75] Chapter 4, Articles (684, 686, 688 and 692) of ICC 1951

[76] Kadhim Kareem and Roaa Saleh, "The Exclusion Clause of Contractual Liability under Both the English and Iraqi Laws," *Journal of Legal Sciences* 32, no. 1 (2017): 240–67, https://www.iasj.net/iasj?func=search&uiLanguage=en&query=شرط+الاعفاء&x=0&y=0.

another person something that can be exchanged which consumes something that equals satisfaction (restitution)."

After receiving a comparable thing, Article 686 confers ownership and accountability on the borrower. According to article 688, "If something is seized, the provisions governing the sale must apply an interest-free loan", otherwise the regulations governing the loan can be applied."

The following is stipulated in Article 692 (1):

"Interest will not be obligatory or the loan unless it has been stipulated in the contract", and "if the borrower has paid interest in excess of the legally permissible rate, he may recover the excess irrespective of whether he had paid it knowing it to be excessive or by mistake. And the maximum legal interest is ranging between (4 to 7%)."

Thus, consumers are affected by unfair terms, in the contract urging Iraqi lawmakers to act constructively and in accordance with the developments of other countries in dealing with unfair terms in a consumer contract.[77]

United Kingdom is one of the developed countries that face the issue of protecting consumer against unfair terms in all standard form contracts. One piece of legislation such as The Consumer Rights Act 2015 (CRA 2015) can increase consumer protection to a certain degree. However, the 2015 CRA Law does not address the practice of using unfair terms in loan contracts at banks. Besides that, there are several initiatives by the UK government to protect the borrowers.[78] The Consumer Credit Act 1974 (CCA) provides detail guideline for the documentation of the rules

[77] Khalaf, "The Determinates of Financial Development in Iraq"; Alwattan Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans," economy, 2018, https://www.alwatanvoice.com/arabic/news/2018/10/14/1182464.html.

[78] UK Government, "Unfair Contract Terms Explained," vol. 37, 2015; UK Government, "Consumer Rights Act 2015" (2015), http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf.

for consumer credit and hire purchase, it also addressed issues connected to early settlement by customers and supplier repossession, information requirements in pre- and post-contractual actions, and other related matters.[79]

A general cancellation right is another clause in the CCA that gives customers the opportunity to contest credit agreements in the event of a "unfair relationship" between them and the creditor. The CCA focuses especially on protecting consumers from unfair provisions in a standard form loan contract. Additionally, the UK has a separate entity called the Financial Conduct Authority (FCA) that is empowered under the Unfair Terms in Consumer Contracts Regulations of 1999 to challenge any unfair terms in a standard form consumer contract[80].Any business or person that provides credit cards and personal loans must comply with the FCA.[81]

The Consumer Protection Law 2010 (CPL 2010) was approved by the new Iraqi parliament. The Act lays forth guidelines that forbid business fraud and deceit in the selling of goods or services. However, because of administrative processes that obstruct the Act's execution, it has not yet been fully implemented.[82] Nonetheless, the establishment of such regulation has not been done in such a way that consumers are protected from the abuses of traders. In this nation, unjust provisions that are

[79] Peter Cartwright, *Consumer Protection in Financial Services* (London: Kluwer Law International, 1999), 17-21, accessed June 25, 2016, https://books.google.com.my/books?id=IRsdFl30gwwC&pg=PR7&dq=consumer+protection+in+loan+contract+in+uk&source=gbs_selected_pages&cad=3#v=onepage&q=OFT&f=false.

[80] UK Government, "FCA Consultation on the Fairness of Variation Terms in Consumer Contracts under the Consumer Rights Act 2015," Hogan Lovells, 2018, https://www.hoganlovells.com/blogs/fision/fca-consultation-on-the-fairness-of-variation-terms-in-consumer-contracts-under-the-consumer-rights-act-2015.

[81] James Devenney and Mel Kenny, *European Consumer Protection: Theory and Practice* (Cambridge University Press, 2012), https://books.google.com.my/books?id=ivSH7PEQ-w8C&pg=PA64&dq=consumer+protection+in+loan+contract+in+uk&hl=en&sa=X&ved=0ahUKEwiMvYW-zaHNAhVl26YKHdvBCckQ6AEINTAA#v=onepage&q=OFT&f=true.

[82] Tariq Ajeel, "A Study in the Procedural Provisions of the Consumer Incidence Suit. A Comparative Study under the Consumer Protection Law No. 1 Of 2010," *AlMamon College Journal*, no. 27 (2016): 183–200, https://www.iasj.net/iasj?func=fulltext&aId=110909.

included into consumer contracts by businesses, standard form contracts, and third-party rights have not been protected by the contract law in a way that promotes consumer rights.

As a result, in their dealings with consumers, banks and companies must exercise legal control over the contracting process.[83] The Iraqi CPL 2010 falls short in comparison to UK laws and regulations in several crucial respects, most notably in protecting consumers against unfair terms in contracts through the exclusion of traders' contractual obligations.[84]

1.3 Research Questions

To address the legal issues in this research, the following research questions are raised in the area of study:

1. Are the laws in Iraq designed to protect consumers from unfair terms in the form of personal contract standard loans?

2. What consumer protection mechanisms are in place to protect consumers from unfair terms in personal loan contracts with banks around the world, specifically under UK law?

3. To what extent consumer protection from unfair terms in personal loan contracts is offered by Iraqi institutions?

4. How to improve the Iraqi laws and institutional role that supposed to protect consumers from the unfairness in the personal loan contract terms?

[83] Zkry Mohammed and Nasir Cactus, "Civil Protection of the Familiar Conditions in Commercial Contracts," *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 1, no. 1 (2009): 45–88, https://www.iasj.net/iasj?func=fulltext&aId=37004.

[84] Aboalqor Rafiqa, "Commitment to Inform Customer in the Realm of Bank Loans," *Legal and Political Journal*, no. 12 (2018): 11–24.

1.4 Research Objectives

This study tries to give a thorough explanation of how consumers are protected against unfair terms in loan contracts. Specifically, the study aims to attain the following objectives:

1. To analyses Iraqi laws governing unfair contract terms of bank loan contracts.
2. To examine at consumer protection measures applied to the problem of unfair terms in personal loan agreements with banks in other jurisdictions, particularly in the UK.
3. To investigate the role of Iraqi institutions in protecting consumers from unfair loan contract terms.
4. To recommend improvements to the Iraqi laws and institutional roles that supposed to protect consumer from the unfairness in the personal loan contract.

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1.5 Significance of Research

The findings of this study add to our understanding of the law related to consumer protection. In actuality, the paper offers a legal examination of how European regulations against unfair terms in a standard form personal loan contract provided by the banks have changed the law in industrialized nations, notably the UK. This nation's laws are distinguished by special protection from unfair terms in consumer contracts. The research also looks at whether the Iraqi Consumer Protection Law 2010 and the Civil Law of 1951 are effective enough to stop new consumer contracts with unfair terms. As a result, the study made both theoretical and empirical contributions. Theoretically, it produced an in-depth content analysis of prior research on the uneven negotiating power in the standard form contracts in Iraq and other countries.

Furthermore, consumers of the banking sector could benefit from this research that can help them in litigating and strengthening their legal rights before the banks. The study is significant since it deals with critical consumer protection issues. Consumer protection, particularly against unreasonable conditions, is no longer an afterthought. It has become an exigency because it concerns every person in society. Hence the study demonstrates an effort in linking the concept of "consumer" with that of "citizen." In fact, it may be the first to address the subject of consumer protection against unfair terms under Iraqi law in depth.

Also, the banking sector could benefit from the research in following best practice regarding issue of personal loan contract with the consumers. In fact, complaints from the imbalanced situation in a loan contract (standardized form contracts) has been increasing particularly between the superiority position of banks in lending money and the vulnerable situation of borrowers (consumers). The standard form loan contract also includes many unfair terms that can be detrimental to a borrower in the performance stage. Often the loan consumers do not know the danger of these terms because of the skilful ways the terms are put to gain better profit. This situation will worsen if the Iraqi legislature does not intervene to provide an equal position, particularly by amending the old laws and issuing new regulations to organize the unfair terms. Hence the findings of this study will contribute to the Iraqi legal writing and the body of legislation by facilitating the consumer dealing with banks in developing legal ideas about educating and protecting consumers in existing of unfair condition in the standard of form contract.

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Moreover, this study is beneficial to the regulators to take the opportunity to solve the apparent loopholes in the current laws and to facilitate the enhancement of the existing laws in Iraq.

Despite unfair terms in consumer loan contracts being a significant issue worldwide, they have not been studied in sufficient depth in the Iraqi literature. The available studies have not provided the necessary evidence and background information about the research gaps addressed in this study. Thus, research of this magnitude also contributed to the existing knowledge in the area. Hence the study contributed theoretically and empirically.

Moreover, this research could also be a great source of information to practitioners, lawmakers, and academics. The findings will help judges in making decisions and lawyers in solving practical problems. Further, it could be a guide for legislators intending to address the current inadequacies in this area. Under these conditions, the United Kingdom is well-suited for this research because it has a sophisticated and robust mechanism for dealing with unfair terms. Additionally, their method for dealing with unfair terms in consumer contracts takes into account both the complex legal framework and the institutional role that controls the complaints procedure.
Finally, it can provide researchers with a deeper understanding of related legal issues.

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1.6 Limitation of the Study

This study faced certain limitations, firstly, the difficulty of using the real characters and names of the interviewees because of the essence of the strict rules of the legal

position. Adding to that, limited appointment time for the interview due to a busy schedule. Therefore, this limits the researcher to have a long discussion. In spite of that, the researcher managed to get saturate information as much as the interview's time allowed.

Secondly, the topic of this research has a few prior studies done before to examine relevant aspects of issues consumer protection in Iraq. Therefore, the research took a long time to read, analyse, compare and conclude to provide a comprehensive legal framework to protect consumers that contracting with banks through standard form loan contract.

1.7 Structure of Thesis

Seven chapters make up the entire study project. The first chapter serves as an introduction and focuses on the need of learning how to protect consumers in Iraq from unfair terms in loan agreements. It begins with the identification of the problem that require investigation from the researcher, based on this, the problem statement was presented. The chapter also presented the research questions which were developed in line with the problem statements. Research objectives were also presented in line with the research questions and the problem statements. Then, the chapter also discussed the significance of the research.

The study approach used to accomplish the four research objectives is described in Chapter 2. It covered the study's socio-legal and doctrinal methodologies research design. It also described the research scope, as well as the research population and sample. This chapter also covered data types, data collection methods, and data

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analysis techniques. Finally, the measures' reliability and validity were thoroughly discussed. In fact, every phase in the research methodology is presented in detail, and the relationship between the outcomes of each phase and research objectives are also discussed.

Chapter three reviews the literature related to the problem statements of research and operational definitions of the terms used in this study. Besides, the literature review also provides the development of contract law theories and doctrines. The chapter also covers consumer protection from unfair terms in standard form loan contracts in industrialized nations.

Chapter four is the analysis the Iraqi laws governing unfair contract terms of bank loan contracts. In this chapter, the researcher will review the best data gathered from interviews for this study and examine the suitability of the Iraqi Consumer Protection Law 2010, Civil Law 1951, and associated Iraqi legislation dealing with battling new consumer contracts with unfair terms. The researcher will also examine the background and history of the Iraqi judicial system in this chapter.

The research's second objective, which focuses on consumer protection measures taken against unfair terms included in personal loan contracts with banks under UK law, is described in the fifth chapter. Concerns about managing consumer protection from unfair terms in personal loan contracts led to a discussion of the legal procedures of other legal systems, including the UK from Europe. The chapter then attempts to thoroughly comprehend the legal framework that has been implemented in the protection of the weaker party in the loan contracting procedure, as well as any

connected rules that protect such party from unfair terms. The legal justification for standard form contracts as well as consumer protection against unfair terms are both defined in this chapter. The approach includes an examination of the concepts and mechanisms for protecting consumers from unfair lending terms.

Chapter six focuses on the examination of Iraqi, UK institutional role in providing consumer protection from the unfairness in a loan contract. It discussed the Iraqi government's consumer protection framework that applied in the courts and public authorities and compared same with that of UK.

The conclusions and suggestions for improving institutional roles and consumer protection legislation for unfair terms in personal loan contracts with Iraqi banks are summarized in Chapter 7. Limitations of the study and suggestions for future research were also set in this study.

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CHAPTER TWO
RESEARCH METHODOLOGY

2.1 Introduction

The methodology presented in this chapter is developed in line with the objectives of the study. It can be recalled that the objective of this study is to provide in-depth explanation about unfairness of terms in loan contracts and the remedies available to consumers if need arises. Because these issues are not solved or discussed sufficiently in the Iraqi's recent studies. The study also intends to discuss the extent to which the current legal rules or sections included in the Iraqi laws are sufficient in protecting consumers.

In particular, it looked to the developed law in UK that deals with unfairness in the consumer contract, the purpose being to assess the comprehensiveness of the legal protection for vulnerable consumers in Iraq. The study adopted the socio-legal and doctrinal approaches to address the research problem stated above and achieve the research objectives. The methodology will be divided into seven sections: research design, research scope, study population, data kinds, data collecting, data analysis methods, and methods for assessing the reliability and validity of the findings.

The Oxford Dictionary defines research as a rigorous analysis of a topic in order to learn new facts or information about the subject.[85] Research design is the term used to describe the planning and execution of a research project. It involves creating a

[85] "Research," Oxford Advanced Learner's Dictionary, accessed October 5, 2019, https://www.oxfordlearnersdictionaries.com/definition/english/research_1.

detailed picture of the full empirical research process before it begins[86]. Hence In the simplest terms, "research" may be described as "a systematic investigation towards increasing the sum of human knowledge" and as a "process" of identifying and examining a "fact" or a "problem" with the goal of gaining an understanding of it or coming up with a suitable solution from it. The research methodology is regarded as scientific when a researcher uses organized techniques. [87]

2.1.1 Research Design

The study adopted the socio-legal and doctrinal approaches to overcome the problem stated and achieve the research objectives. Researchers utilize a study design in advance to help them identify the kinds of data they need, how to collect them, how to analyse them, how to interpret the results, and how to appropriately report their findings. Thus, a research design minimizes the confusion, uncertainties, and practical challenges linked with the research problem. It enhances the reliability and the efficiency of the findings.[88] The qualitative exploratory study design was chosen by the researcher for this investigation. Specifically, a doctrinal approach was used.

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A systematic method or strategy to the "understanding" of "law" and its "operational facets" is required due to the complicated nature of law and its practise. Methodical research of these legal issues speeds up the identification of new and current legislative legislation, policies, and their social implications. It also helps a researcher assess the effectiveness of law as a mechanism for socioeconomic change and to identify barriers or bottlenecks. This study conducted via a qualitative

[86] Khushal Vibhute and Filipos Aynalem, *Legal Research Methods Teaching Material Prepared under the Sponsorship of the Justice and Legal System* (The Justice and Legal System Research Institute, 2009), https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf.
[87] Bruce Berg, *Qualitative Research Methods for the Social Sciences*, 4th ed. (Long Beach: California Stole University, 2011), https://trove.nla.gov.au/work/11203163.
[88] Anwarul Yaqin, *Legal Research and Writing* (Malaysia: LexisNexis, 2007).

approach from a socio-legal research study. This approach is exploratory in nature and is often conducted using an interview method, thus, it helped the researcher to discover any unfair circumstances surrounding loan contracts in Iraq. Although the researcher has discovered general problems in the selected area, the research is still needed to acquire better understanding of the dimensions of the stated problem.

According to Anawarul Yaqin, this type of research refers to the examination of a particular element of "law in operation," "law in context," and "law in action," which refers to the examination of how the law now operates or ought to operate in relation to societal problems, challenges, and questions. This phrase is usually applied when a researcher employs investigation, alongside legal research of some issues which is basically of a “social nature” and applying data collection techniques used in social science research. Objectives of this study is to examine the legal problems brought on by injustice in loan agreements and their solutions. To further investigate the role played by Iraqi institutions in protecting consumers from deceptive loan arrangements. And analyse laws that governing unfair terms of banks loan contracts. Furthermore, the study investigates the need for modern law and determines if an intrusive application of law can result in answers or solutions to issues or problems, or whether law can be used as a tool of change, control, and reform.[89]

In the lack of their own defined legal research technique, legal academics have recently become interested in the policy of law, particularly in understanding the social research methodology. These academics or researchers rely on social science study methodologies and data collection techniques (such as questionnaires,

[89] Ibid.

observations, schedules, or interviews). This strategy eventually led to the development of a sort of "hybrid" legal research technique that combines conventional or analytical (legal) research with empirical or social research.[90]

A qualitative research is majorly focused on measuring the assessment of a subjective issues in terms of attitude, opinion, and as well behaviour. This kind of research represents researcher's insights and impression towards a particular investigation. [91] Creswell pointed out that qualitative research is a universal mechanism that involves finding new facts. It is also defined as a large model of examination based on what happens in a natural setting whereby researchers are able to develop detailed understandings based upon high flexibility and their involvement in the real experiences. A key identifier of a qualitative research is the social perspective being examined from the responder's viewpoint. To note, there are various types of research designs that apply qualitative techniques in carrying out a research activity. This diversity in the types of research designs yields huge impact on the research strategies explored.[92]

As stated above the qualitative research track has been adopted in this study by using an interview method. By adopting this method, the researcher was able to get more comprehensive data about the state of consumer protection in Iraq's loan agreement process. The most effective method for looking at the reality of consumer protection against unfair contract terms is this one. Furthermore, it assists the comparison and analysis done in this study to thoroughly grasp the research issue. The researcher has

[90] Johnny Saldana, *Fundamentals of Qualitative Research*, ed. Pathtricia Leavy (New York: Oxford University Press, 2011).
[91] Berg, Bruce. *Qualitative Research Methods for the Social Sciences*. 4th ed. Long Beach: California Stole University, 2011. https://trove.nla.gov.au/work/11203163.
[92] John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, *The SAGE Publications*, 4th ed. (United States of America: SAGE Publications, Inc, 2013).

limitations in assessing the legal position regarding the treatment of unfairness in a loan contract in the Iraqi judicial system. Therefore, this tool enables the researcher to obtain sufficient information about this issue and facilitated the achievement of the first and second research objectives.

Furthermore, to offer a thorough understanding of the pure legal issues in the search field, the researcher used a pure legal research methodology or doctrinal study. Doctrinal research, often referred to as legal research, academic research, armchair research, or conventional research, is fundamentally a library-based study, meaning that the researcher may get the documents they need from libraries, archives, and other databases.

The primary goal of such study was to find, examine, analyse, and explain the functions of specific laws or legal institutions--as well as to provide facts, principles, provisions, concepts, and theories in a methodical manner. On this account, the researcher has mostly used secondary material, such as textbooks, journal articles, government reports, and primary data retrieved from applicable laws and legislation. Thus, these methodologies achieve the objectives of such study. Eventually, this strategy leads the researcher to meet the study's first and second objectives.

Additionally, in the analytical study, the researcher made a critical assessment of the content using data or information that was easily accessible in the public domain.[93] An analytical approach is thoroughly assessing and analysing data or documents in order to understand them, provide an explanation for them, or draw inferences and

[93] Vijay M Gawas, "Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System towards The Research Development," *International Journal of Law* 3, no. 5 (2017): 128–30.

conclusions from them.[94] In order to achieve this study's goals namely, to examine the pertinent legal provisions of Iraqi law in an effort to counteract the injustice in a loan agreement—the researcher adopted an analytical technique. Since customers face new concerns every day and the law must deal with new issues, the research is focused on law reform in Iraq. The existing law is frequently judged to be insufficient or inappropriate in dealing with such issues.[95]

Moreover, Anwarul Yaqin discussed the comparative research methods and its objectives. In this, research may undertake the study of issues or questions in some legal systems, either wholly or partly, in a comparative perspective. Similar to this, a researcher may be motivated to compare and contrast two scenarios that take place under the same legal framework in a comparative study. A research can also explore a problem, issue, or topic in one legal system and compare it to what may exist in another legal system.[96] Additionally, comparative legal study involves comparing similar laws or legal systems from other jurisdictions, as the name suggests. It demonstrates the lessons that may be drawn from one another's successes and disappointments.[97]

Therefore, the aim of a comparative study may either be to present information that exist in more than one varying factual contexts, or to compare ideas, views, concepts, values, rules, theories, principles, or other conditions that hold certain bearings on law and its institutions from varying contexts or jurisdictions, or within same context

[94] Yaqin, *Legal Research and Writing*.

[95] Ibid.

[96] Ibid.

[97] Maurice Adams and Dirk Heirbaut, *The Method and Culture of Comparative Law Essays in Honour of Mark van Hoecke Hardback*, 2014, http://www.hartpub.co.uk/ComparativeLaw2014.pdf.

or jurisdictions under different conditions. In addition, the majority of legal studies aim to show how the law has changed or improved in some way so that it can work better. Accordingly, the researcher is interested in doing a partial comparison, to propose some improvements to the Iraqi laws which regulate unfairness in consumer loan contracts.[98]

As this study bases its significance in comparing the concepts and rules of the UK from European countries on one hand and the Iraqi legal systems on the other hand, comparative law is the most appropriate methodology attain its objectives. The definition of comparative law is "the comparison of various legal systems around the world." As a result, "comparison, i.e., contrasting and comparing, is the obvious method in comparative law research."[99]

This study explored the rules and regulations in the United Kingdom that protect consumers from abusive lending terms. In addition, in regard to Iraq's unfair terms, the ICC gives discretionary power for judges to evaluate and eliminate the unfair terms in the contract. In order to improve the latter, this research examined common law and principles, their impact on the UK, and civil law in French legislation for safeguarding consumer interests. It also compared them to the roles of courts and government bodies in Iraq.

Anwarul Yaqin, on the other hand, pointed out that there are different methods of comparison, the "method of investigation and analysis best suited to achieve a goal

[98] Ibid.

[99] Luciana Iwasa, "A Comparative Evaluation of the Legislative Controls on Unfair Terms and Exemption Clauses in Consumer and Business Contracts In England and Brazil" (Aston University, 2013), https://research.aston.ac.uk/en/studentTheses/a-comparative-evaluation-of-the-legislative-controls-on-unfair-te.

or desire to understand something" should thus be used by legal academics." To put it another way, the research concerns of this specific inquiry should be addressed in a sensible and proper manner.[100] Accordingly, the comparative law approach enabled the researcher to achieve the second and third objectives in this study.

2.1.2 Research Scope

This study dealt with the most modern necessity in this globalized era. This research focuses solely on the legal aspects that govern consumer protection against unfair terms in personal loan contracts, as well as the institutional function that aids in interpreting the provisions of Iraqi laws in these areas. The demand for this type of loan is increasing worldwide. In Iraq particularly, the need for bank loans has increased following increase in the rates of poverty and unemployment problems in the country. In actuality, such a finance structure may also aid in promoting social sustainability and small- and medium-sized business initiatives.[101]

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In conducting the study, the researcher adopted a socio-legal research via a qualitative design. According to Anwarul Yaqin,[102] a researcher has to choose an area of research that is limited in nature and should specify its general limits in the research proposal. The Civil Code No. 40 of 1951 and the Consumer Protection Law No. 1 of 2010 make up the scope of the legal system in Iraq.

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[100] Yaqin, Anwarul. *Legal Research and Writing*. Malaysia: LexisNexis, 2007.

[101] Ali Kareem, "The Impact of Banks Specialized in Finance and Investment (Real Estate Bank Case Study in Muthanna Province for the Period 2002 - 2017)," *Mouthanna Journal for Economic and Manegement Sciences* 8, no. 3 (2018): 49–62, https://doi.org/10.18081/MJAES/2018-8/49.

[102] Yaqin, Anwarul. *Legal Research and Writing*. Malaysia: LexisNexis, 2007.

Although the banks considered the aforementioned customer concerns when creating the standard form personal loan contract in Iraqi. In regards to such a significant matter, the Iraqi legislative does not have a comprehensive legislation that rules the circumstance. There is a general consumer protection legislation in Iraq (Consumer Protection legislation 2010) but it does not expressly include financial services. Furthermore, the 1951 Convention focused largely on governing the fundamental rules of contracting between reasonable parties. Consumers of personal loans in Iraq are complaining about unfairness in the standard form contract, which gives lenders more negotiation power.

But those laws' provisions often referred to as "consumer protection laws "did not achieve the desired accuracy protection on the one hand, and the legislator neglected to address the fundamental rights enjoyed by the consumer of the standard form loan contract in particular.

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Furthermore, while there is rise of public demand on the personal loan coupled with the increase in the number of banks that offers these loans, there is absence of a particular consumer court that can specifically address the consumer banking services with deficiencies, through adequate protection of the borrowers. Citizens' rights of access to the courts will reduce or ignored based on these drawbacks.

Increased transparency is a key element of the regulatory measures employed in the UK to address the problem of unfair contract terms in consumer credit contracts. The regulator may then take enforcement action to limit the use of the word or notice that was in violation of the transparency requirement. As a result, information disclosure

has significantly contributed to the growth of legal control in the UK consumer credit sector. Both UK law and Directive 87/102 (as revised by Directives 90/88 and 98/7 which resembles national consumer credit laws) make this clear.

The primary goal of these community initiatives is to raise consumer knowledge about the costs of credit. The Preamble of the Directive specifically stipulates that "the consumer should receive adequate information regarding the terms and cost of credit, as well as regarding his obligations." Other provisions also assist to promote transaction transparency, while the regulations have little effect on the cost of credit. The implication is that while this action virtually leaves the agreement's content unaltered, authority over how the deal was made has been created. Finally, because of these two distinct challenges, consumers have varying levels of comprehension of the loans they are taking out.

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UK and French laws served as the benchmark or model to improve the Iraqi laws. Additionally, the UK's (CRA 2015 and CCA 1974) also be referred. The Consumer Credit Act of 1974 is one of the key laws that governs hire purchase and personal credit. The operations of lenders and customers in personal credit and hiring agreements are governed by this Act in a highly detailed and prescriptive manner. In actuality, all phases of a personal credit transaction are governed by the Act because of its thoroughness. The pre-contract negotiations, the mode of entry, the execution of the relevant credit or hire agreement, the agreement's form and content, cancellation and withdrawal rights, the supply of information and copy documents, problems that emerge over the course of the agreement, default procedures, termination procedures, and methods of enforcement are all included.

Furthermore, it is art of the obligations of the lender to ensure compliance with the CCA's pre-contractual requirements, its form, content as well as the format prescribed in it., The compliance obligation of lender also include the provisional requirements relating to post-contractual information as well as the specified procedures to be applied in the event of any wrongful activity that could happen contrary to CCA's prescription and upon enforcement of the agreement. Even in the absence of a court ruling, a credit agreement is illegal if it is entered into in violation of the CCA criteria.

It is important to highlight that any lender that participates in lending activities to persons should be aware of and evaluate the CCA's "unfair relationships" requirements. These terms apply to any agreements made with any individual debtor. The requirements are intended to be implemented in regulation, exemption, and wholly unregulated agreements entered into after April 6, 2007. It also applies retroactively to agreements taken before earlier to that date if they had not been properly rounded-off by that time. In an instance where a borrower alleged his/her relationship with the lender is unfair to him/her it becomes an obligation to the lender to prove to the contrary.

Thus, in such a situation is which the lender was found wanton through an unfair relationship with the borrower, the provisions of the CCA would be fully applied by the courts. As a result, the court may "re-open" and alter the credit agreements, discharge any debts owed under them, approve money repayment to the borrower, return or cancel the security to the borrower, reduce or cancel interest, or order the lender to take all reasonable steps to resolve the situation. As a result, in order to

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achieve the study's principal aims, the researcher additionally used analytical and comparative methodologies from doctrinal legal research.

The laws were studied in two areas in this study: the scope of protection and the test of fairness in a loan arrangement. These methodologies enable the study's principal objectives to be met because the research investigates the extent to which existing Iraqi laws protect consumers against unfair terms of a basic contract. Following that, the research advocated reforms to Iraq's legal system to address unfairness in consumer contracts by applying the UK approach, which can enable the creation of a unique legal system in Iraq to combat unfairness in consumer contracts.

2.1.3 Population of the Study

The entire group of individuals, incidents, or interesting things that the researcher wants to investigate is referred to as the population. It is a group of fascinating individuals, occasions, or objects from which the researcher must derive conclusions to examine the entire community.[103] A sample is an element of the overall population.[104] The sample for this study was chosen based on population factors,[105] this is done to guarantee that the sample is representative of the populations studied.[106] As a result, sampling describes a technique for picking an adequate number of pertinent items from a population. Researchers can generalize findings for

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[103] Uma Sekaran and Roger Bougie, *Research Methods for Business: A Skill Building Approach*, ed. Illustrated 7, abridged, 6th ed. (John Wiley & Sons, 2016), https://books.google.com.my/books?hl=en&lr=&id=Ko6bCgAAQBAJ&oi=fnd&pg=PA19&dq=Uma+Sekaran+and+Roger+Bougie,+Research+Methods+for+Business&ots=2B4LV4NVmQ&sig=LPZT795oCZB5gB58kgQXyQlVl3E#v=onepage&q=Uma Sekaran and Roger Bougie%2C Research Methods for Busin.

[104] Ibid

[105] Ibid

[106] Ibid

all population elements after studying the sample and understanding its qualities or characteristics.[107]

There are no strict rules about sampling or sample sizes in a qualitative research. An appropriate sample size depends on the purpose of the research, the quality of the information being collected, and the availability of resources. The investigator decides what kinds of respondents to interview based on emerging and predefined criteria and continues to interview the respondents until no new information is discovered.[108] The sampling process is classified into two types: There are two types of sampling: probabilistic and random. In non-probability sampling, the sample is chosen systematically rather than at random, whereas in probability sampling, the researcher chooses a sample at random from the population. In this study, the researcher employed non-probability sampling.[109]

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The purposive sampling or judgment sampling method,[110] is the type of non-probability sampling technique.[111] The researcher clearly specified what information is required and decided to select people who can provide it owing to their expertise or experience, which is why this sampling strategy was chosen. When investigating a particular topic with certified specialists in society, purposeful sampling is seen to be

[107] Ibid

[108] Creswell, John. *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches. The SAGE Publications*. 4th ed. United States of America: SAGE Publications, Inc, 2013.

[109] Anne Sofia Fink, "The Role of the Researcher in the Qualitative Research Process. A Potential Barrier to Archiving Qualitative Data," *Forum: Qualitative Social Research* 1, no. 3 (2014), http://www.qualitative-research.net/index.php/fqs/article/view/1021/2201%3E.

[110] Ma Dolores and Tongco, "Purposive Sampling as a Tool for Informant Selection," *Ajournal of Plants,People,and Applied Research*, 2007, 147_158, http://hdl.handle.net/10125/227.

[111] Vibhute and Aynalem, *Legal Research Methods Teaching Material Prepared under the Sponsorship of the Justice and Legal System*.

most appropriate.[112] In this context, the study of unfairness of personal loan contracts with banks necessitates the need for accurate and sensitive information from knowledgeable experts within the society.

Four banks from Iraq have been chosen as the informant of the study. Al-Rasheed Bank and Al-Rafidain Bank were chosen for the study because they had the highest rate of borrowing among Iraq's state-owned banks. Al Rafidain Bank is moreover the biggest state-owned commercial bank in the nation. Al Rasheed Bank, however, is the second-largest commercial state-owned bank. This could benefit to have insight into the accredited banks of government.

For private banks, the banks selected for the study are the United Bank for Investment and Gulf Commercial Bank. These banks are not only accredited but also the oldest private banks in Iraq since the first permission was granted to private banks to operate in the country. The United Bank for Investment is established in 1994 splitting branches all over Iraq's provinces and same to the Gulf Commercial Bank, established in 1999. They work according to the Iraqi Central Bank rules and regulations. Further, both offer personal loan services that support the Iraqi economic and financial developments.

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2.1.4 Types of Data

Because of the types of data involved and needed for the study, quantitative and qualitative approaches are typically utilized in research. Because this is a qualitative study, it contains qualitative material such as interviews and documents. Primary

[112] Ibid.

data includes recorded interviews of informants of legal experts, consumer protection organisations, documentations of standard form loan contract bodies in the Iraqi banks, and documentation like the Iraqi Civil Code No. 40 of 1951 and the Iraqi Consumer Protection law in 2010 and UK laws. Textbooks, government publications, and academic journals are examples of secondary data. Tertiary data sources include related newspaper articles, internet sources, and guidelines. The main data would be supplemented and improved by secondary and tertiary data.

2.1.5 Data Collection Method

Data collection is the methodical gathering of information from numerous sources for a certain goal. This study used the interview method to satisfy the qualitative approach criteria of using many sources of data. A conversation between two or more people that includes questions intended to extract information from the interviewee such as facts or assertions is referred to as an interview. A typical element of qualitative research is interviews.

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The breadth of information gleaned from participants is the main benefit of qualitative interviewing. A frequent qualitative approach for studying a respondent's thoughts, feelings, and views is an in-depth interview.[113] Data from an interview can provide a wealth of content for a researcher to report, particularly about the events and experiences. Towards this end, the researcher used open-ended questions to encourage detailed responses from the interviewees. This method is particularly selected due to the need to get in-depth information from a direct, one-on-one conversation with the respondents, especially those concerned with consumer

[113] Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*.

protection in the standard form contracts and personal loan contracts. In fact, through open-ended questions, an in-depth interview also provides data that is clear from any ambiguity. Based on above the researcher choose (27) interviewees to achieve the objectives of the study as explained below.

Lawyers who are expert in loan contracts provided general information of legal rules and regulations that govern the standard form loan contracts. They were also asked about consumer protection in this field. The informants also include legal academicians who are expert in consumer protection and also include individuals from consumer protection associations. These liable persons are considered sufficiently knowledgeable and experienced about the study area hence are capable of providing meaningful data to facilitate the achievement of the research objectives.

Moreover, judges used as informants are experts in the area of civil law, these judges explained for the current Iraqi civil laws and regulations that applied in these standard form contracts. They also expressed their views on the effectiveness of those legal guidelines in safeguarding the weaker party in a standard form contract. Finally, legal officers and specialized officers who are in-charge in loan contracts from the two specified banks also served as informants. These officers are responsible for issuing personal loan agreements. They told the researcher their knowledge about the consumer protection rules and regulations in their institutions. Personal loan consumers that already got loan from banks were asked about their experience with their banks as showed in Table 2.1.

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Table 2.1

Table of Selected Top Private Banks for the Study

No.	Private Banks	Loans in 2014
1	United Bank for Investment	421
2	International development Bank for finance and investment	196
3	Middle East Bank for investment	167
4	Iraqi United Bank	276
5	Iraqi Investment Bank	158
6	Commercial Gulf Bank	171
7	Iraqi Private Bank	145
8	Babylon Bank	158

Source: Central Bank of Iraq

As earlier indicated, this study will collect its data through recorded interviews. The research adopts the in-depth interview. The data will be collected using interview protocol, with questions and answers recorded. The interview protocol will include the heading (The date, place, interviewer and interviewee), the instruction for the interviewer to achieve a standard templates for all the interviews sessions to be conducted, the questions, the probes to further deepen the earlier stated questions, with a stand-by audio or visual-audio recording gadgets. An interview is a conversation between two or more people where questions are asked by the interviewer to obtain facts or statements from the interviewee. Interviews are a standard part of qualitative research. Table 2.2. showed the sample of respondents and justifications for this study.

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Table 2.2

Sample of Respondents and Justifications

No	Sample	justifications	Sample Number
1	Lawyers who are expert the loan contracts from different firms.	These lawyers will give general information of legal rules that organising those standard form or adhesion contracts. In addition, they will be asked for the area of consumer protection in this organisation in the Iraqi laws. Moreover, to find out their academic opinions and their vision of future in this field	5
2	Legal academicians who are expert in consumer protection from the consumer protection organization.	These persons will give a meaningful information to enrich this study as well as support any initiative in this developing area.	4
3	Judges who are expert in the area of civil law	These judges will be asking for the current Iraqi civil laws and regulations that applied in these standard form contracts. Furthermore, they will give their opinion about those legal rules if sufficient to protect the weaker party in a standard form contract. It will two judges from the higher and two from the lower court.	4
4	Officers from 4 commercial banks; a. Legal officer b. Specialise officer in charge of loan contracts	This section is responsible for issuing standard form loan contracts. They will be asked for their knowledge about consumer protection.	4
5	Personal loan consumers that already got loan from banks	Those consumers will provide their experience with banks in getting personal loans to support the problem statement.	10

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The armchair method was used to obtain the required information; these information are readily available online from the Iraqi government's websites such as Electronic Iraqi Newspaper, Iraqi Academic scientific journals, and Iraqi Legal Database (ILD). Another legal website explored was the UUM Virtual Library which served as the source of references for the author. All the data obtained from the above sources was then analysed to identify the recurring information and variations in the topic under study. The data from these secondary resources was then categorized into themes to facilitate interpretation of the findings.

2.1.6 Data Analysis

Data from the interviews, as well as information gathered from papers and archival works, were analysed in order to draw conclusions. The procedure entails preparing data for analysis and evaluating the results using qualitative and thematic content analysis. A complete method to qualitative content analysis comprises a systematic evaluation of forms of communication to document patterns objectively. The method was found to be suitable for studying emotions conveyed in naturally occurring linguistic data.[114]

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Furthermore, qualitative content analysis can be utilised to gain a better knowledge of a given research field, particularly by discovering how specific themes or topics have been understood.[115] The researcher used qualitative content analysis into the study's data analysis in order to assess the information gathered from the interviews.

[114] Fink, "The Role of the Researcher in the Qualitative Research Process. A Potential Barrier to Archiving Qualitative Data."

[115] Hsiu Fang Hsieh and Sarah E. Shannon, "Three Approaches to Qualitative Content Analysis," *Qualitative Health Research* 15, no. 9 (2005): 1277–88, https://doi.org/10.1177/1049732305276687.

In particular, the data was examined using the traditional technique of qualitative content analysis.

The taped interviews were transcribed into texts for this study. The information is then sorted in accordance with the study questions or objectives. In this example, the researcher followed the standard procedure for conducting a qualitative data analysis, which includes generating coding schemes and themes.[116]

The researcher in this study opted for a manual theme analysis over a computer-based content analysis. Although the latter method is useful, it is limited in terms of producing data that can be logically interpreted. In specifically, the researcher examined each theme in order to comprehend how they related to one another. To relate the themes to other ideas, the researcher studied the memos written during the analysis process. In this case, following the generic process of qualitative data analysis is important and necessary. This process involves development of coding schemes and themes to be looked for in the data, with their appropriate description.

Given special consideration are the phrases, sentences, things, concepts, and semantics that were derived from the data. Towards this end, the researcher first transcribed all the data received from the various sources manually. The transcription was then reviewed, and a check list was formulated from through such review. Subsequently, the researcher then reviewed the typed document again. Before coding the data, the researcher resolved any discrepancies between the paper and the checklist.

[116] Yaqin, *Legal Research and Writing*.

The laws, rules, and norms related to the study's concerns were examined using a legal research methodology. The rule on statutory interpretation was used in analysing the data.

2.1.7 Reliability and Validity

It is important to note that the generalizability process in reliability and validity for qualitative research differs from the experience in quantitative research approach. [117] In qualitative research, reliability refers to a situation in which the researcher cross-checks his methodology to see if it is consistent with previous works of researchers in related but unrelated studies. Validity refers to a situation in which the researcher verifies the accuracy of his findings using the established procedure.[118]

As a dependability technique, this study ensures that transcripts are properly examined to validate the absence of evident errors. Additionally, the coding methods for topic identification have their codes defined accurately. The easiest way to do this is to create a qualitative codebook, compare the data to the codes, and then generate definitions for the codes.

The triangulation approach was employed to assess the correctness of the findings' validity. Different data sources were reviewed using triangulation to create a logical argument for the topics. The conclusions are therefore supported by developing

[117] A. Mustafa, *Case Study MethodTheory And Practice, Research And Management Approaches* (India: Atlantic Publishing, 2008), https://books.google.com.my/books?hl=en&lr=&id=ofWJV2WmzDEC&oi=fnd&pg=PA1&dq=Mustafa,+A.,+Case+Study+Method,+Theory+and+Practice:++Research+and+Management+Approaches&ots=u4T1hf5kj-&sig=o53kVkSRIc9EMMc5-xK1akS4-gM#v=onepage&q=Mustafa%2C A.%2C Case Study Me.

[118] Nahid Golafshani, "The Qualitative Report Understanding Reliability and Validity in Qualitative Research," *The Qualitative Report* 8, no. 4 (2003): 597–606, http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf.

themes based on the convergence of several sources.[119] This study identified a point of convergence for themes drawn from documents from past studies on legislative measures to restrict the occurrence of unfair terms in personal loan contracts with banks in Iraq and interview sessions that were studied.

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[119] Ibid.

CHAPTER THREE
LITERATURE REVIEW

3.1 Introduction

This section discusses issues regarding theory of contract law, inequality, and standard form of loan contracts, and solutions that are suggested and adopted in this regard. It is crucial to emphasise that these subjects are only touched upon briefly. The subject of unfair terms in consumer contracts is discussed, along with the broad idea of contract law theory, the notion of unequal bargaining power, and others. Following that, this part examines the conventional form of loan contracts and the unjust provisions that are included in them that affect loan consumers. It also considers the various measures proposed and implemented in reaction to it, such as the United Nations (UN) Guidelines and unjust terms in the United Kingdom (UK). The UK laws that adopt possible solution in response to these problems are also discussed. Finally, the status of consumers in Iraq is reviewed, as well as flaws in Iraqi regulations that reveal the existence of unjust terms in standard form loan contracts.

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3.2 Keywords Definitions of Research

Standard form Contracts: These are contracts that have no room for negotiation or alteration in the provisions of the contract. They are provided as a 'take it or leave it' proposition. Consumers generally have few opportunities to read, comprehend, or seek assistance on contract terms.[120]

[120] Daniel D. Barnhizer, "Bargaining Power in Contract Theory," MSU Legal Studies Research Paper 4, no. 3 (2007): 1-26, accessed October 21, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578578.

Unfair Terms: Terms that significantly unbalance the parties' contractual rights and obligations are considered unfair. For instance, a clause that permits or has the effect of permitting one party (but not another) to avoid or limit performance of the agreement, a clause that permits or has the effect of permitting one party (but not another) to terminate the agreement, and a clause that sanctions one party (but not another party) for contract breach or termination.[121]

Consumer: An individual operating wholly or mostly for purposes unrelated to their trade, business, craft, or profession is referred to as a consumer.

Trader: An individual who acts in furtherance of his or her trade, business, craft, or profession is referred to as a trader, whether the trader is operating directly or through a third party who is acting in the trader's name or on the trader's behalf.

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Personal Loan Contract: A personal loan is a sum of money loaned to a person for personal, non-business purposes. It could be an amount of money given temporarily by one party to another. The terms of the loan agreement, which include any interest that will be charged and a deadline for repayment, must be followed in order to repay the money. The risk that a borrower won't pay back a loan must be assumed by the lender. Additionally, it alludes to lending itself.[122]

Substantive and Procedural Unfairness: procedural fairness ensures fairness of bargaining process, whereas substantive fairness involves assessing the fairness of

[121] Lorraine Conway, "Consumer Rights Act 2015," House of Commons Library (2015): 1, accessed November 25, 2016, https://www.google.com/#q=Consumer+Rights+Act+2015+By+Lorraine+Conway.

[122] US LEGAL, s.v. "Personal Loan Law," accessed November 25, 2016, http://definitions.uslegal.com/p/personal-loan/.

the content of the bargained contract. It is contended that the courts readily mediate in procedural matters but are disinclined to intervene in substantive issues.[123]

Consumer Contract: a contract in which it is assumed that one of the parties would have less negotiating power since they are consumers as opposed to corporations.[124]

3.3 Theory of Contract Law

The basis of any business agreement is contract law. Any trading of commodities or services, as well as passing of property, is based on contracts. Usually, it refers to documents that have been signed by both parties in person.[125] A precise and comprehensive definition of a contract does not exist internationally. However, writers of textbooks commonly start their articles with an explanation of contract law that is absent from the actual laws. Definitions serve as examples or guidelines. Three instances illustrate this idea. The first is Anson's Law of Contract in the first chapter. In addition, it states that "the law of contract may be provisionally described as that branch of law which determines the circumstances under which a promise shall be legally binding on the person making it."[126]

The fact that it is claimed to be 'provisional' demonstrates its shakiness, and it lacks answers as to why the law regards certain pledges as legally obligatory and not

[123] Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, "Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts," *Australian Journal of Basic and Applied Sciences* 6, no. 11 (2012): 331-41, accessed October 19, 2015, http://irep.iium.edu.my/28627/1/AJBAS_331-341.pdf.

[124] Ibid

[125] Veljko Trivun, Vedad Silajdžić, and Fatima Mahmutćehajić, "Exclusion and Limitation of Liability Clauses in Electronic Contracts," *University of Sarajevo* : 1, accessed April 29, 2015,https://emnet.univie.ac.at/uploads/media/Trivun_Silajdzic_Mahmutcehajic_01.pdf.

[126] Sir Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract*, 29th ed. (New York: Oxford University Press, 2010), under "1,"

others.[127] The second instance is on The Law of Contract, provided by Treitel. It begins as follows: "A contract is an agreement that establishes obligations that are acknowledged or enforceable by law. Contractual obligations differ from other kinds of legal obligations in that they depend on the agreement of the contracting parties."[128]

It was noted by Treitel that this proposition is subject to some important qualifications even though it remains generally true. First, the law is primarily concerned with the appearance rather than a fact of agreement. Second, because "contracting parties are typically expected to maintain specific standards of behaviour," the presumption that obligations are paid by contracts has to be changed. Certain contracts are implied by law to contain clauses, as opposed to being the product of the parties' agreement. Thirdly, the idea that contracts serve as the cornerstones of obligations under contracts has to be clarified "as to the scope of the principle of contract freedom." For instance, in order to protect the weaker party in a contract, judges and the Parliament have recently limited the scope of the concept of contract freedom.[129]

Although there is no universally recognized definition of what a contract is, the core concepts of contract law may be precisely described. An agreement must be reached by the parties for a contract to be concluded. A consideration must be used to support the agreement. An intention must also exist to develop legal relations. In general, the courts would confirm whether one party's offer was accepted by the other party and

[127] Ibid

[128] Sir Guenter Treitel, *The Law of Contract*, 11th ed. (England: Sweet & Maxwell, 2003), under "1,"

[129] Sir Guenter Treitel, *The Law of Contract*, 11th ed. (England: Sweet & Maxwell, 2003), under "1,"

then judge whether an agreement was established. Furthermore, the acceptance must be consistent with the offer.[130] This is a universal principle, and duly obtainable in Iraq.

Iraq is governed regionally by a civil law that completely depends on state traditions and legislative authority to regulate the civil obligations of contract parties. Originally, it implemented the Sharia Law system[131] with Civil disputes between parties to a contract are governed by Iraqi Civil Code No. 40 of 1951 (hereafter ICC 1951).[132]

For the time being, it is founded on the freedom of contract concept and is thought of as the superior relationship. Therefore, the contract's terms and conditions are at the exclusive discretion of the parties.[133] The ICC is unique in that it upholds the idea of contract freedom, according to which parties are free to enter into any agreement and determine its terms. The legislative language also specifies the boundaries of this freedom: the rule of law, public order, and morality. Hadi (2012) asserts that the main principle of contract theory determines that parties to a contract are free to enter into any agreement and to choose its terms, with the exception of those that are contrary to morality or public policy. [134]

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[130] Ewan McKendrick, *Contract Law Text, Cases, and Materials*, 5th ed. (United Kingdom: Oxford University Press, 2012), 3-6.
[131] Ali Mohammed Khalaf Al-Eliwi, "Legal Framework for Protecting Computer Programs in the Ambit of Intellectual Property: A Comparative Study between Iraqi Law (Civil Law) and English Law (Common Law)" (PhD diss., Newcastle Law School, 2012), 1, accessed March 3, 2015, https://theses.ncl.ac.uk/dspace/handle/10443/1912.
[132] Mansour Hatem Mohsen and Aaman Tarek Makki, "The Binding Force of Unilateral Liberalization in Terms of the Contract," *AL- Mouhakiq Al-Hilly Journal for legal and political science* 1, no. 1 (2009): under "405," accessed April 4, 2015, http://www.iasj.net/iasj?func=fulltext&aId=37045.
[133] Bassam Majid Sulayman and Akram Mahmoud Hussein, "Objective of Will (Comparative Analysis in the Light of the Risk Management and Legal Legislation)," *Mosul University School of Law*: 95-99.

[134] haider hassan hadi, "Restriction of Freedom of Contract Actions Contained Within the Scope of the Intellectual Property Rights in the Light of Modern Legislative Developments-Comparative Study," in "16,17," special issue, *Al-Hiqouq Journal* 4, no. 16 (2012): 339-58, accessed April 26, 2015, http://www.iasj.net/iasj?func=fulltext&aId=38617.

In accordance with Article 146 (1) once a contract is signed, it is legally binding and neither party may renounce it or amend it unless compelled by law or with the other party's approval.[135]

As was previously said, the theory of contract law has undergone great growth as a result of the rising usage by several organizations and sectors. In order to keep up with the current research in this field and generate Iraqi laws, it is worthwhile to provide it greater space in Iraqi studies. Therefore, our study made an effort to close this gap and add to the body of knowledge.

3.3 Inequality Bargaining Power Doctrine

The industrial uprising resulted in spectacular modifications, not merely in the techniques of capital markets, production, and conveyance, but in economic and social relations, and in the techniques of going about business too. With the union of transportation, manufacturing, capital, and various other industrial units into a number of large entities, economic relations moved to a new paradigm within large scale enterprise, gained considerable, governmental, and social strength, and appeared to implement that authority in the exploitation of their consumers.[136]

The freedom of contract premise, which relies on the parties being seen as separate entities with equal negotiating power to protect their interests, is no longer valid in

[135] Iraqi Civil Code no 40 of year 1951

[136] Ewan McKendrick, *Contract Law Text, Cases, and Materials*, 5th ed. (United Kingdom: Oxford University Press, 2012), 3-6, file.

light of these changes in how business is conducted. An author remarked that the continuous use of the freedom of contract concept as an organizing principle was due to the divergence between the theoretical underpinnings of the principle and its application. This is also extended to the actual practice in the commercial and consumer marketplaces.[137] Hugh Collins, for example, consistently argues that it is important to distinguish between the "old" and "new" paradigms of contract. The objective appearance of mutual assent is specified by the old model as performed in the parties' behaviour or words in a formalized dance of offer, consideration, and approval. In contrast, the "new" form, unambiguously accounts for biased power of bargaining between parties. [138]

According to Slawson, [139] "the changed terms of contracting", and that practice of contract has undergone fundamental changes since the late 19th century. In the light of this, the following are to be noted: (a) Business organizations progressively sought risk management by utilizing standard form contracts, hence, reducing contracting cost among similar types of transaction; (b) The contracting rate and the need to engage in various contracts on a daily bases to acquire the necessities of life, increased; (c) modern commercial activities results in a rise in numerous complex legal implications than under the old contract model.

As a result, customers develop a set of expectations about how various products and services will behave as expected. As a result, using standard form contracts is a

[137] Daniel D. Barnhizer, "Bargaining Power in Contract Theory," MSU Legal Studies Research Paper 4, no. 3 (2007): 1-26, accessed October 21, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578578.

[138] Hugh Collins, "Good Faith in European Contract Law," *Oxford University Press* 14, no. 2 (1994): 236-37, accessed July 14, 2015, http://www.jstor.org/stable/pdf/764619.pdf?acceptTC=true.

[139] David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power," *Harvard Law Review* 84, no.3 (Jan. 1971)): 529-30, accessed September 13, 2015, http://www.uclalawreview.org/pdf/57-3-1.pdf.

sensible and economically effective method of conducting business. Standard forms are pervasive since they signify the least cost means for repeat sellers to do business or transact with one-shot buyers. The implementation of standard form contracts may be steady with a real difference in bargaining power. It is also completely consistent with decent business executions which capitalize on the contractual surplus accessible by the parties. [140]

According to previously stated, "understanding the development in this area of contract law gives rise to two (2) rivalry concepts; the traditional concern for freedom of contract, the cardinal rule of contract law, and, on the other hand, the concern to curtail partiality caused by significant inequality in bargaining power, and in this context, referred to as consumer protection principles.[141]

Customers must be safeguarded in this situation, and the government is counted on to take a paternalistic role through legislative action.[142]. This study investigated the significance of the idea of unequal negotiating power in a consumer loan contract with an Iraqi bank and provided a general understanding of this philosophy. As a result, it conducted an in-depth content study of previous research on unequal negotiating power in standard form contracts, both globally and in Iraq specifically.

[140] Carolyn Edwards, "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues," *UMKC L. Rev* 77, no. 3 (2009): under "648," accessed August 7, 2015,http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1281&context=facpub.

[141] Saad Bin Marwi v Chan Hwan Hua, [2001] 2 AMR 2010; [2001] 3 CLJ 98

[142] Ahmad S. A. Alsagoff (Syed.), *Principles of the Law of Contract in Malaysia*, 2nd ed. (Kuala Lumpor: Malayan Law Journal Sdn. Bhd, 2003), 1-460, accessed May 3, 2015, http://books.google.com.my/books?id=-QriGAAACAAJ&redir_esc=y.

3.5 Standard Form Contracts

As courts recognized differences between contracting parties, modern contract law evolved.[143] When one side is obliged to sign a contract because of societal or economic pressure, this happens. Rising awareness of these negotiation differences was partly responsible for the adoption of standard form contracts.[144] Mabahj claims that standard form contracts, often referred to as contracts of adhesion, are non-negotiable agreements created and provided to the other party on a "take it or leave it" basis.[145]. Using the same contract on numerous or more transactions with a range of parties is the aim of adopting this type of contract.

This comprises of those who are not involved in the content drafting and have no influence over it. When a contract is being drafted or when the courts start to see unfairness between contractual parties, they may be identified as potential or prospective parties. This happens when, as previously said, economic and/or societal pressures force one side to enter into a contract.[146] The standard form contracts, according to Kessler, are also designed to permit the use of the same contract in various transactions and in the reporting or authoring of the content. This should be acknowledged by the potential parties when the draft is being processed.[147]

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[143] Datuk Joginder Singh v Tara Rajaratnam, [1983] 2 Malayan Law Journal 196

[144] Atiyah, An Introduction to the Law of Contract, 4th ed. (New York: Oxford University Press, 1989), under "495," accessed May 21, 2015, http://trove.nla.gov.au/work/7285842?q&sort=holdings+desc&_=1445416793077&versionId=46347767.

[145] Mabahj Habib Youssef, "The Acceptance in the Adhesion Contract" (PhD diss., University of Khartoum (UOFK), 2015), 369, accessed June 14, 2015, http://khartoumspace.uofk.edu/handle/123456789/11025.

[146] Atiyah, An Introduction to the Law of Contract, 4th ed. (New York: Oxford University Press, 1989), under "495," accessed May 21, 2015, http://trove.nla.gov.au/work/7285842?q&sort=holdings+desc&_=1445416793077&versionId=46347767.

[147] Friedrich Kessler, "Contracts of Adhesion-Some Thoughts about Freedom of Contract," Faculty Scholarship Series (1943): 1, accessed October 11, 2015, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers.

The continuing evolution of the contract law from the traditional to the modern theory, has been marked by the execution of both legislation and modifications in judicial methodologies. This is intended to control the substantive and procedural fairness in contractual dealings. Particularly, procedural fairness ensures fairness of bargaining process, whereas substantive fairness involves assessing the fairness of the content of the bargained contract.[148] It is contended that the courts readily mediate in procedural matters but are disinclined to intervene in substantive issues. However, legislative efforts have made attempts to look into such matters.[149]

Due to the increasing of using the contract of adhesion and standard form contracts by the traders and corporations and in spite of the importance of this subject and its direct effects on the society. However, researcher did not find any deep or clear dissertations in this regard to tackle the problem, except few descriptive studies. Thus, by assisting Iraqi laws in creating legal concepts about protecting consumers from unfair provisions in the standard form contract, this study contributed to the corpus of legal writing and legislation in Iraq.

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3.6 Loan Contract

The majority of the authors claimed that the loan contract is a superb standard form contract with outstanding adherence.[150] A contract for adhesion has been shown to be non-negotiable and so un-negotiated. The whole contract is drafted by one of the parties, and the other is not permitted to debate or change it. There are only two

[148] Substantive unfairness or 'contractual imbalance' as it has been referred to by Lord Brightman in Hart v O'Connor, refers to unfair contractual terms which have been included in a contract. A consumer contract or a term of the contract can be declared as unfair by the court or tribunal based on its substance. It is submitted that it is not necessary to prove that the substantively unfair term is procedurally unfair at the same time.

[149] Daniel D. Barnhizer, "Bargaining Power in Contract Theory," MSU Legal Studies Research Paper 4, no. 3 (2007): 1-26, accessed October 21, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578578.

[150] David Horton, "The Shadow Terms: Contract Procedure and Unilateral Amendments," UCLA Law Review 57 (2010): 1, accessed November 26, 2016, http://www.uclalawreview.org/pdf/57-3-1.pdf.

options: either agree to all of the terms of the contract in full or decline to enter into a contract.

The prevalence of adhesion contracts in contracts nowadays raises serious concerns. Contracts with utilities (such as those with power, gas, water, and waste management), banks, leasing, insurance, and loan agreements are a few examples. These are dictated contracts, which may be understood by the fact that one of the parties has substantial economic clout, possibly even a monopoly on the service provided, making discussion impossible.[151]

In standard form contracts, unfair terms are particularly common in the banking industry. Taking into account the loan contract, which calls for the involvement of a local lawmaker in the area of consumer contracts. The declared intervention's purpose was to safeguard the client, or a person seen to be a "weak," vulnerable contractor, in his or her legal dealings with professionals. The state's proposed response will account for all varieties of unlawful clauses found in consumer contracts. These clauses, which are based on the contract's good faith duty, are typically justified by the immediate need to avert a serious contract imbalance.[152]

A loan agreement is a contract in which a lender (often a financial organisation such as a bank) lays out the terms and conditions under which it is willing to make a loan to a borrower. Loan agreements are also known as "facilities agreements" at times.

[151] Ibid

[152] Eugenia Voicheci, "Freedom of Contract and Its Limitations in the Romanian Civil Code," *Challenges of the Knowledge Society* 4 (2013): 416-27.

This is a more technical term for a loan, which can be defined as a financial "facility" provided by the lender to the borrower or customer.[153]

The majority of loan conversations begin with the lender preparing a paper. This is sometimes referred to as a term sheet, engagement letter, or mandate letter. It outlines the loan's essential terms, which include significant financial parameters like the repayment duration and the interest rate. A term sheet is the genetic code that regulates the contents of the final loan agreement. It expressly states that it is not intended to be a binding obligation for either party; thus, neither party can claim that it is an enforceable negotiating perspective of the borrower, or that one party is liable to the other for actions taken or costs incurred based on the term sheet.

Borrowers are frequently required to countersign their consent to the terms and conditions outlined in the term sheet. As a result, the term sheet stage or process is the optimal moment for a borrower to clarify or negotiate financial terms. This is due to the fact that a lender will argue that the proposed lending terms are based on the term sheet. It is incorrect for a borrower to believe that the terms would remain open for negotiation once the draught loan agreement is prepared. Lenders frequently acquire credit committee (or other internal body) approval based on the term sheet.[154]

However, the nature of the loan arrangement allows for difference between the parties, making the existence of unfair terms a foregone conclusion. Many countries impose stringent legal limits and controls on standard form contracts in general, and loan agreements in particular. These countries also prohibit the addition of unjust

[153] "What Is Loan Agreement?," The Law Dictionary, accessed September 4, 2015, http://thelawdictionary.org/loan-agreement/.

[154] https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Commercial-Loan-Agreements-Oct-2006.pdf

provisions in contracts in order to safeguard the weak and vulnerable party in a contract that has already been established by one side.[155]

"Undoubtedly, certain types of contracts, such as lending and tenancy agreements, have always contained some element of inequality," Angelo and Ellinger claim.[156] The lending process is governed by the Iraqi Civil Code in Chapter 4 Section (i) Article (684). It defines a loan as "a designated definite fund given to another person by another person." It is eaten on the belief that the recipient would refund (restitution) the loan. It is a broad definition because it does not distinguish money lending from other types of lending. According to Article (686) (1), the borrower will own the thing borrowed by taking delivery of it, and his liability on a comparable thing will be established.

Furthermore, according to Article (688), if the loan is repossessed, the law governing sale applies. However, if the loan was interest-free, the regulations governing usage loans will apply. Article 692 (1) states that interest will not be required on the loan unless specified in the contract; (2) If the borrower has paid interest in excess of the legally permissible rate, he may recover the excess regardless of whether he paid it knowing it was excessive or by mistake. Furthermore, as stated in Articles 171 and 172 of the code, the maximum legal interest ranges from (4 to 7%). It is possible to conclude that the ICC does not restrict the possibility of unfair terms in loan contracts. It signifies that it is bound by the general role, i.e. the Adhesion contract.

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[155] Carolyn Edwards, "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues," *UMKC L. Rev* 77, no. 3 (2009): under "648," accessed August 7, 2015,http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1281&context=facpub.

[156] Angelo and Ellinger, "Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States," *Loyola of Los Angeles International and Comparative Law Review* 3, no. 14 (1992): under "457," accessed August 7, 2015, http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1245&context=ilr.

As a result, this study will focus on the developed appropriate laws and initiatives around the world, specifically the laws in the United Kingdom.

3.7 Era of Consumer Protection from Contract's Unfair Terms

Protection of consumers in the contractual transactions with businessmen is an area of contemporary judicial and legislative concern. Everyone now agrees that certain laws of contract are inadequately protecting the consumer's legitimate interests. Yet, there is no consensus on what specific reforms must or should be made in the legal system.[157]

Currently, a number of approaches to consumer protection regulation are in use. There is increasing regulation of the production processes for consumer goods. This is usually by providing minimum standards of quality and establishing a system for inspecting the output. Food and drug products are particularly the subjects of this type of regulation. The terms of many consumer contracts, for example, insurance contracts are directly regulated by prescribing or proscribing certain terms.

Sometimes, the terms that are prescribed or proscribed are stated in statutes or administrative orders. In other instances, the courts are relied upon to strike contract provisions that are considered undesirable.[158] In cases where courts are relied on for

[157] Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (England: Ashgate Publishing, Ltd., 2007), 1-467, accessed May 6, 2015, https://books.google.com.my/books?id=AtEo6yGO55UC&source=gbs_navlinks_s.

[158] William F and Mulroney, "Deceptive Practices in the Marketplace: Consumer Protection by New York Government Agencies," *Fordham Urban Law Journal* 3, no. 3 (1974): 1, accessed April 12, 2015,http://ir.lawnet.fordham.edu/ulj

enforcement of this type of regulation, there have been efforts to encourage more consumers to use them by reducing the cost of litigation.[159]

On the other hand, the consumers' necessity to sue is invoked by the enforcement process which can be bypassed by subjecting the undesirable seller's conduct to criminal sanction. Also, administrative agencies can be established to search for illegal practices and bring them to court's attention. A very common approach to regulation of consumers' protection is to require sellers to convey notice of contract provisions to consumers in the hope it will induce many not to enter unfavourable contracts. Regulation of labelling and advertisement are good examples of this approach.[160] However, there are numbers of considerations to determine the type of consumer protection regulation to use.

The Supreme Court of Justice, the decision of the commercial division no. 347/2000: The contractual balance of the agreement has no longer been kept, due to price non-payment by the debtor on the maturity date thereof, the creditor being harmed by the devaluation of the national currency, according to the inflation rate. In reality, there is no question about the application of a sanction for non-performance of a contractual obligation … but about updating of the price agreed upon the conclusion of the agreement, by the determination of the value of plaintiff's obligations on the effective payment date by the defendant, in order to re-establish the contractual balance.

[159] Naemah Amin, "Protecting Consumers against Unfair Contract Terms in Malaysia: The Consumer Protection (Amendment) Act 20101," special issue, *Malayan Law Journal A* 1 (2013): 1-11, accessed April 16, 2015, http://irep.iium.edu.my/30573/1/Unfair_contract_terms.pdf.

[160] Richard F and. Dole Jr, "Merchant and Consumer Protection the New York Approach to the Regulation of Deceptive Trade Practices," *Cornell Law Review* 53, no. 5 (1968): 1, accessed April 12, 2015,http://scholarship.law.cornell.edu/clr/vol53/iss5/1.

Freedom of contract is an influential value in determining the nature of the regulation, and the consumer contracts. It is noteworthy that there is considerable disagreement on how freely arrangements established by private parties can be forcibly revised.[161] According to Hadi (2012), the general principle of contract theory states that contracting parties are free to conclude whatever contract they desire and to set its terms, except those that violate public policy or morals.[162] There is also a disagreement about the manner of regulating consumers' transactions. For example, what the requirements for a "fair" consumer contract should be. The effectiveness of other different techniques of regulating consumers' transactions to achieve the goals set is another important consideration. Often, these considerations will conflict; and the most effective type of regulation may require the most drastic infringements on freedom of contract.[163] This is one of the legal challenges of this 21st century.

According to some experts, the globalized transaction of the twenty-first century has witnessed an increase in consumption as a weapon of market protection. The concept of consumerism arose as a result of dissent in the widely held conviction in the main concept of contract freedom. According to Abdullah, Yusoff, and Zakuan, the concept of contract freedom, which held that consumers should take care of themselves or "let the buyer beware," was no longer relevant in consumer contracts of this era. This was breached by dishonest traders who used it as an effective instrument to exclude their liability by writing contracts in a manipulative manner.

[161] Haider Hassan Hadi, "Restriction of Freedom of Contract Actions Contained Within the Scope of the Intellectual Property Rights in the Light of Modern Legislative Developments-Comparative Study," in "16,17," special issue, *Al-Hiqouq Journal* 4, no. 16 (2012): 339-58, accessed April 26, 2015, http://www.iasj.net/iasj?func=fulltext&aId=38617.

[162] Ibid

[163] David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (New York: 2009), 1, accessed April 17, 2015, http://daviddfriedman.com/The_Machinery_of_Freedom_.pdf.

In a modern market economy, the main argument for more protection for the weak and vulnerable group known as consumers is equality of bargaining power. Furthermore, consumers do not have enough information to judge which provisions in consumer contracts are fair and balanced.[164] International efforts have been undertaken to regulate unfair contract terms, whether within or beyond the framework of contract law. As examples of these initiatives, certain developed and developing countries will be addressed in the next paragraph.

3.7.1 United Nations Guidelines (UN Guidelines)

More than 50 years ago, the term "consumer rights" first appeared in a political setting. President J.F. Kennedy defined four consumer rights in his special message to the United States Congress in March 1962: the right to safety, the right to be informed, the right to choose, and the right to be heard.[165]. These are the foundations of the UN Guidelines. Consumers International (CI) created a set of eight core consumer rights based on these recommendations (supplemented by five consumer responsibilities: "Critical awareness; Involvement or action; Social responsibility; Ecological responsibility; and Solidarity").

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Consumers have the following rights: (1) the right to basic needs satisfaction; (2) the right to safety; (3) the right to be informed; (4) the right to choice; (5) the right to be heard; (6) the right to redress; (7) the right to consumer education; and (8) the right

[164] Farhah, Sakina Shaik Ahmad Yusoff, and Zeti Zuryani Mohd Zakuan, "Exclusion Clauses in Consumer Contracts: Malaysia as the Model for Asean? 1, accessed April 17, 2015, http://versys.uitm.edu.my/prisma/view/viewPdf.php?pid=15507. And AZIMON ABDUL AZIZ et al., "Towards Harmonisation of the Asean Contract Law: The Legal Treatment of Unfair Consumer Contract Terms among Selected Asean Member States," *Asian Journal of Accounting and Governance* (2011): 61-65, accessed April 18, 2015, http://core.ac.uk/download/pdf/11494318.pdf.

[165] Bălan, Carmen. "Consumer Right to Information before Purchase: Research on the Romanian Online Stores for Technical Consumer Goods." (2014).

to a healthy environment.[166] Despite UN Guidelines, Iraqi legislators do not provide individual loan users with protection against unfair contract terms.

3.7.2 European Consumer Protection Initiatives in Controlling Unfair Terms in the Consumer Contract

Consumer policy was considered in the 1972 Paris Summit, ten years after Kennedy's speech to the US Congress. When the European Court of Justice (CJEU) introduced the rule of reasons in Cassis de Dijon, which may justify an infringement of the free circulation of goods nearly seven years later, consumer protection was mentioned as one of the overriding necessary requirements. Consumer policy was stated for the first time in the Maastricht Treaty (1992).[167]

In this context, credit law appears to be a necessary and essential instrument to allow the development of consumer credit at Community level that is to say on a cross-border basis. Credit law is at the service of economic issues by ensuring a balance between the development resources offered to banking institutions and consumer protection. The Directive of April 23, 20083 on consumer credit contracts is the realization of these issues. It aims to harmonize products and practices relating to consumer credit in Europe. The aim is to erase the points of divergence between Member States created or maintained by the 1987 directive. The aim of the directive is to open up the consumer credit market in Europe to competition on the basis of harmonized products and practices. And develop European demand for credit.

[166] : Jeremy Malcolm "Updating the Un Guidelines for Consumer Protection for the Digital Age," *Consumers International Regional Office for Asia Pacific and the Middle East* (2013): 1, accessed May 7, 2015,http://a2knetwork.org/sites/default/files/updating-ungcp.pdf.

[167] Brigitte Leucht, "The Policy Origins of the European Economic Constitution," *European Law Journal* 24, no. 2 (2018): under "14," https://onlinelibrary.wiley.com/doi/pdf/10.1111/eulj.12255.

Through transparency, it will increase consumer confidence and choice between different European, i.e. non-national, offers. Through competition, it will bring price cuts. This should therefore improve consumer welfare, and in aggregate, social welfare. The main elements of the directive cover the principle of transparency, consumer rights and the duty of the lender. Article 1 defines the purpose: "to harmonize certain aspects of the laws, regulations and administrative provisions of the Member States relating to consumer credit contracts".

However, the first consumer, product liability, and doorstep selling Directives were approved in the context of the internal market in 1985. On 5 April 1993, Directive 93/13/EC on unfair terms in consumer contracts ('Unfair conditions Directive') was approved in this regard. It was to be incorporated into the national legal systems of the then-members of the European Economic Community by December 21, 1994. The Unfair Terms Directive, as is generally known, strives to safeguard consumers. This is stated in the Directive's recitals, and the CJEU emphasized it several times: "The system of protection implemented by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, in terms of both bargaining power and level of knowledge.[168]"

The Directive only applies to contracts between businesses and consumers ('B2C'). The consumer is a natural person acting outside his business, trade, or profession, whereas the seller or supplier is a natural or legal person acting within his business, trade, or profession (Unfair Terms Directive, article 2(b), (c)). Furthermore, the

[168] Louise Gullifer and Stefan Vogenauer, *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (United Kingdom: Bloomsbury Publishing, 2014), 1-421, https://books.google.com.my/books?id=XTHvBQAAQBAJ&pg=PT491&lpg=PT491&dq=This+is+stated+in+the+recita.

Directive addresses minimal harmonisation. This indicates that Member States may impose stricter measures to safeguard consumers (article 8).

According to the Directive's general scheme, an unfair term in a B2C contract that is not individually negotiated is not binding. Contract clauses that represent the essence of the contract, on the other hand, do not have to pass the fairness test if they are written in simple and understandable language. When a phrase is deemed unjust, the Directive provides general guidelines. Furthermore, a phrase must be written in clear and understandable language (article 5).

To determine whether a contract term is unfair, it must first be determined whether the challenged contract term is covered by the Unfair Terms Directive, which applies to a non-individually negotiated provision in a B2C contract (Unfair Terms Directive, art 3(1)).[169] A term is considered unfair if it "creates a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer" (Unfair Terms Directive, article 3(1)). To assess this significant imbalance contrary to good faith, 'all the circumstances attending the contract's conclusion and all the other terms of the contract or of another contract on which it is dependent' must be taken into account, as well as 'the nature of the goods or services for which the contract was concluded' (article 4(1)). Which circumstances to be evaluated can be deduced from CJEU case-law.[170]

[169] Roberto Baratta, "Complexity of Eu Law in the Domestic Implementing Process" (19th Quality of Legislation Seminar, Brussels, 2014), http://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf.

[170] Louise Gullifer and Stefan Vogenauer, *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (United Kingdom: Bloomsbury Publishing, 2014), 1-421, https://books.google.com.my/books?id=XTHvBQAAQBAJ&pg=PT491&lpg=PT491&dq=This+is+stated+in+the+recita.

In Aziz case,[171] The CJEU discussed a considerable imbalance in rights and obligations to the detriment of consumers. In that case, Mohammed Aziz borrowed EUR138, 000 from Catalunyacaixa, a Catalan bank, to pay off another loan he had taken out to buy his family's property in Spain. The loan was backed by a mortgage on the family's house. Aziz had a monthly income of EUR1, 341 at the time he borrowed the money, on July 19, 2007. He had to pay a predetermined sum of interest of EUR70.04 till January 30, 2008. The interest rate was variable after that date. Aziz failed to pay the monthly instalments beginning in May 2008.[172]

The general terms of the loan arrangement required a debtor to pay an interest rate of 18.75 percent if he failed to pay. When the bank began enforcement procedures against Aziz to sell the residence, he had accumulated a debt of EUR139, 764.76. In the end, the family home was sold for half its value, and Aziz was forced to leave on January 21, 2011. Meanwhile, Aziz had initiated procedures in which he sought a declaratory judgement that certain conditions in his loan arrangement were unreasonable. According to Spanish procedural law, the enforcement actions could not be postponed until a determination on whether the interest rate stipulations were unreasonable was made.[173]

To determine whether there is a considerable imbalance to the consumer's harm, the CJEU decided that a court must compare the situation where the contract was concluded to the position where there is no contract. The latter refers to a circumstance in which a court will apply national rules as if no contract existed. A

[171] Aziz v Caixa d'Estalvis de Catalunya, (2013) Case C-415/11, [2013] 3 CMLR 5
[172] Roberto Baratta, "Complexity of Eu Law in the Domestic Implementing Process" (19th Quality of Legislation Seminar, Brussels, 2014), http://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf.
[173] Jacobien Rutgers, *English and European Perspectives on Contract and Commercial Law* (Amsterdam: Oxford: Hart, 2014), 1, https://www.researchgate.net/publication/302995554_Unfair_Terms_in_Consumer_Contracts.

court can then determine whether and to what degree the consumer will be disadvantaged. If this is the case, there is a considerable imbalance.

The CJEU ruled that a deterioration in the legal situation was sufficient. The CJEU distinguished three sorts of impairment: a restriction of rights, a restriction on the exercise of such rights, and the imposition of additional obligations on the consumer. Aside from a considerable imbalance, the contract term must also be contrary to good faith in order to be considered unfair. The CJEU commented on this in Aziz. The criteria are whether the seller or supplier, treating fairly and equitably with the customer, may reasonably believe that the consumer would have agreed to such a term in individual contract discussions.[174]

In addition, all other contract terms and information included in a term that can be considered an unfair commercial practise must be taken into account. Article 3(3) contains a list of clauses that could be regarded unjust. Thus, the standard for determining whether a condition is unfair is if there is a major imbalance to the injury of the consumer that is contrary to good faith, taking into account all of the circumstances surrounding the contract's conclusion and the other terms of the contract.[175]

As a result, an unfair terms is not legally enforceable (Unfair Terms Directive Article 6). This is an obligatory clause that tries to "replace the formal balance established by the contract between the rights and obligations of the parties with an effective

[174] Roberto Baratta, "Complexity of Eu Law in the Domestic Implementing Process" (19th Quality of Legislation Seminar, Brussels, 2014), http://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf.
[175] Louise Gullifer and Stefan Vogenauer, *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (United Kingdom: Bloomsbury Publishing, 2014), 1-421, https://books.google.com.my/books?id=XTHvBQAAQBAJ&pg=PT491&lpg=PT491&dq=This+is+stated+in+the+recita.

balance that re-establishes equality between them." On-binding is not a legal technical term. There is a distinction between nullity and avoidance in several Member State legal systems. In the context of the Directive, non-binding denotes nullity rather than avoidance. Other issues emerge in this regard, such as whether a court may declare the entire contract non-binding if the customer is better off that way.

Countries worldwide started to give attention to the issue of regulating lending between creditor and borrower in terms of increased protection to the weaker party in the contract. Most of the European countries follow the European Union community counsel which produces the laws and regulations to be followed by the members. In this regard, it regulates the issues of consumer credit protection in an advanced and continuous manner. United Kingdom, through its membership of the European Union is part of the internal market, it works with other European countries and EU institutions to produce and enforce consumer protection laws transnationally.

For instance, In Britain, as in France, protections for consumers in credit contracts were put in place as part of a broad wave of consumer protection measures instituted in the 1970s. Most of these basic protections were legislated in the 1974 Consumer Credit Act. Transparency was a primary focus of the legislation. In general, a consumer credit contract must specify the equivalent annual percentage rate (the legislation specifies how to calculate this), the total cost of credit, and the cost of the product being purchased on credit. Not all financial institutions are required to

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disclose this information: building societies and insurance companies, for example, are exempt from these transparency requirements. [176]

According to the Directive all consumer credit providers, however, had to be formally licensed by the newly created Consumer Credit Licensing Bureau within the Office of Fair Trading. As in France, borrowers who contract for a loan at their door or through the mail enjoy a cooling off period during which they may cancel a consumer loan contract. For instalment credit, creditors also received special protections against repossessions. Creditors were allowed to repossess without a court order only when the consumer had not yet paid for more than one third of the product. In any case a 7-day notice was required. [177]

3.7.3 United Kingdom unfair contract terms in consumer contracts

The fundamental cause for the prohibition of unfair contract terms in the United Kingdom (UK) was the disparity in bargaining power between sellers and purchasers. In the United Kingdom, there are two (2) sources of legislation that govern unreasonable contract terms. The Unfair Contract Terms Act of 1977 (UCTA) is the first. The UCTA rules that nullified clauses relating to culpability for physical harm were the product of negligence. It consolidated the prohibition on contracting out implied terms in supply of products in sale and near sale agreements.

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[176] Louise Gullifer and Stefan Vogenauer, *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (United Kingdom: Bloomsbury Publishing, 2014), 1-421, https://books.google.com.my/books?id=XTHvBQAAQBAJ&pg=PT491&lpg=PT491&dq=This+is+stated+in+the+recita.
[177] Jacobien Rutgers, *English and European Perspectives on Contract and Commercial Law* (Amsterdam: Oxford: Hart, 2014), 1, https://www.researchgate.net/publication/302995554_Unfair_Terms_in_Consumer_Contracts.

Similarly, it established an irrationality board norm to regulate the prohibition and control of liability clauses in other consumer contracts.[178] The UCTA safeguards both business-to-business and business-to-consumer transactions. Despite its title, UCTA exclusively addresses liability limitation and exclusion clauses, as well as indemnification clauses, which refer to other sorts of terms or conditions that are not subject to legislative control.[179]

The Unfair Terms in Consumer Contracts Regulations (UTCCR) are the second piece of law. The UTCCR entered into force in the United Kingdom in 1999. The rule comprises many concepts and extended information on the director's or qualified bodies' powers, which is implemented in cases of disputes. The principle of unfairness is defined in Regulation 5 (1) of the UTCCR 1999: This is the case if a contractual term was not discussed individually, if the term results in a significant imbalance in the parties' obligations and rights, or if the term contradicts the need for good faith. As a result, any contract between a consumer (buyer) and a seller that includes terms that are deemed unfair is not binding on the consumer at any time.[180]

A contract continues to bind the contracting parties as long as the unfair term is removed. The UTCCR has given many agencies the authority to hear consumer complaints and issue injunctions. These bodies operate with uniformity and under

[178] Norliza Abdul Hamid and Hariati Mansor, "The Legal Implications of the Consumer Protection (Amendment) Act 2010 On Contract Terms in Malaysia, *"Annual Summit On Business And Entrepreneurial Studies* (2011): 471-85, accessed April 16, 2015,http://www.internationalconference.com.my/proceeding/asbes2011_proceeding/036_188_ASBES2011_Proceeding_PG0471_0485.pdf.

[179] Alasdair Taylor, "The Unfair Contract Terms Act 1977 (UCTA) Imposes Statutory Limits On the Avoidance of Civil Liability through Exclusion Clauses in Business Contracts for Breaches of Contract, Negligence, or Other Breaches of Duty.," April 26, 2011, accessed May 5, 2015, http://www.seqlegal.com/blog/introduction-ucta.

[180] Willett, Chris. "The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches." *Cambridge University Press* 60, no. 2 (2011): 355–85. https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/functions-of-transparency-in-regulating-contract-terms-uk-and-australian-approaches/CEC4EC08F7B0A60D8620B3F154209F3B.

one regulation to serve varying kinds of complaints on services or goods. Schedule 2 of the UTCCR 1999 also includes a list of provisions that may be unjust and thus not binding. These conditions offer consumers subjective protection and assist them in acting proactively in the event of an unfair contract.[181]

Furthermore, openness is required in contracts to ensure that both parties have a clear understanding of their rights and obligations under the contract. As a result, Regulation 7 of the UTCCR 1999 requires the supplier or seller of goods or services to guarantee that each written contract term is expressed in understandable and plain English. This is aimed at reducing the gap between the parties. The seller is always of professional knowledge level, usually more that the consumers. Bright discussed against contractual terms being in obscure wording or small print. Sellers and suppliers should also avoid using jargons, foreign terminology, difficult meanings, expressions (such as "force majeure"), and referring to legislative provisions that are useless to customers.[182]

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Regarding to unfair terms in more recently, UK introduced a new unified piece of law. The Consumer Rights Act 2015 is the latest edition of the consumer rights which consolidate the consumer protection laws it came into force on 1 October 2015. It acts as a consolidated Act, but it also makes important reforms to consumer law. The Unfair Terms in Consumer Contracts Regulations 1999 ('the UTCCRs') and the Unfair Contract Terms Act 1977 ('UCTA') (in relation to consumer contracts) are replaced as part of the consolidation. Consumers' rights with connection to the sale of

[181] Martin Ebers, "Unfair Contract Terms Directive (93/13, accessed May 6, 2015, http://www.eu-consumer-law.org/consumerstudy_part2c_en.pdf.

[182] Abdulla M. A. AlGhafri, "The Inadequacy of Consumer Protection in the UAE: The Need for Reform" (Phd diss, Department of Law, Brunel University, 2013), 27, accessed April 22, 2015,http://bura.brunel.ac.uk/bitstream/2438/7691/1/FulltexThesis.pdf.

goods and unjust terms remain generally unchanged but are clarified and increased in sections. The goal is to empower consumers by establishing a streamlined and better legal framework that provides more rights when purchasing goods, services, and digital content. Part 2 is dedicated to reforming and consolidating the law dealing to unfair terms in consumer contracts.[183]

Iwasa conducted an analytical comparative study between England and Brazil, which are different in legal system. His study focused on the legislative control of unfair terms and exemption clauses in consumer and small company contracts. He argued that there are many scholars with the view that Brazilian law is appropriate to be compared with England's. He justified his choice by saying;[184]

> *"According to them, the so-called 'mature legal systems' should be preferred to the 'affiliated' ones, because the former often gives origin to other systems and they are in a more advanced stage of development which implies more perfected ways of solving legal problems"*

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In spite of the differences between two systems, this study conducted research on unfair terms in loan contracts in Iraq and UK to get benefit from the developed laws, regulations and initiatives. Because it looked to the laws and regulations that protect consumer from unfair terms in the loan contract. In addition, relating to the unfair contract terms the ICC give discretionary power for judges to evaluate and eliminating the unfair terms in the contract. Accordingly, this research looked to the

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[183] Evans, Huw. "Fairness in Consumer Contracts: The Case of Unfair Terms." *International Journal of Consumer Studies* 32, no. 5 (2008). https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1470-6431.2008.00700.x.

[184] Luciana Iwasa, "A Comparative Evaluation of the Legislative Controls On Unfair Terms and Exemption Clauses in Consumer and Business Contracts in England and Brazil" (Phd diss., Aston University, 2013), 1, accessed March 26, 2015, ProQuest.

UK laws in protecting interests of consumers and compare it with the role of courts and government authorities in Iraq to enhance the last.

3.7.4 United Kingdom's Consumer Protection over Unfair Terms of Financial Service

While substantive consumer law has been thoroughly Europeanized as a result of the EU's activities, and the EU's influence is growing, regulation of enforcement issues has largely remained in the competence of the Member States, and the Member States have taken different approaches to enforcement. In France, the criminal law function has traditionally been underlined to supplement private enforcement, as in the United Kingdom, where public organizations such as the Office of Fair Trading (OFT) or the Consumer Ombudsmen play a key role and criminal law sanctions are also utilised. [185]

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One author concluded that the "law can never hope to evolve as rapidly as market and practices" illustrates the challenges that the new authority will face. Therefore, The UK government decided to transfer the regulation of financial services to the established financial service authorities. [186]

As mentioned above, the UK government is in the process of revolutionising the way in which the financial services industry is regulated, and the OFT and FCA is examining the protection of vulnerable consumers in markets for financial services.

[185] James Devenney and Mel Kenny, *European Consumer Protection: Theory and Practice* (United Kingdom: Cambridge University Press, 2012), 57-67, accessed June 25, 2016, https://books.google.com.my/books?id=ivSH7PEQ-w8C&pg=PA64&dq=consumer+protection+in+loan+contract+in+uk&hl=en&sa=X&ved=0ahUKEwiMvYW-zaHNAhVl26YKHdvBCckQ6AEINTAA#v=onepage&q=OFT&f=false.

[186] Peter Cartwright, *Consumer Protection in Financial Services* (London: Kluwer Law International, 1999), 17-21, accessed June 25, 2016, https://books.google.com.my/books?id=IRsdFl30gwwC&pg=PR7&dq=consumer+protection+in+loan+contract+in+uk&source=gbs_selected_pages&cad=3#v=onepage&q=OFT&f=false.

At the same time, the structure of the financial services industry is changing, and the need for the law to keep pace with change has never been greater. [187]

Furthermore, The Consumer Credit Act 1974 (CCA), one of the most ambitious pieces of consumer protection legislation ever, generated a considerable comment at its inception, and has continued to provoke attention from academic commentators. It outlines detailed rules on the method of documenting the agreements for hire purchase and consumer credit, and on the information required before and after the contract. It also outlines the rules on practices which includes early and prompt settlement by consumers/buyers, and reclamation by businesses. The CCA offers a general annulment right and permits consumers to defy credit agreements when an 'unfair relationship' arises between them and the creditor. [188]

With the review of the United Kingdom's UTCA 1977, UTCCR 1999, and CCA 1974, there is no doubt that Iraq needs legislation on the unfair terms of contract, specifically taking into consideration the integral limits of its judicial control. Therefore, the inequality of the power to bargain between sellers and buyers was the key aim of regulating the unfair contract terms particularly in the UK, and generally in the EU countries. The idea was that the buyers or consumers stand in a weak bargaining position as compared to the sellers. This results in the consumer being unable to influence the content of the terms or negotiate when terms are presented in advance by the supplier or seller. UK has adopted enhanced transparency as a

[187] Ibid

[188] James Devenney and Mel Kenny, *European Consumer Protection: Theory and Practice* (United Kingdom: Cambridge University Press, 2012), 57-67, accessed June 25, 2016, https://books.google.com.my/books?id=ivSH7PEQ-w8C&pg=PA64&dq=consumer+protection+in+loan+contract+in+uk&hl=en&sa=X&ved=0ahUKEwiMvYW-zaHNAhVl26YKHdvBCckQ6AEINTAA#v=onepage&q=OFT&f=false.

prominent feature of the regulatory devices to address the problem of unfair contract terms.

In Iraq, however, the most recent consumer protection law falls short of addressing the issue of unfair contract terms. As a result, customers have suffered as a result of infringed rights and binding contracts. As aforementioned, the challenges brought about by unfair terms has not been addressed by the legislature in Iraq via any available law. The ramifications of these unfair terms have compounded the need for a clear set of rules that are affected by customer preferences. This is because unjust phrases are frequently employed by dealers or businesses in commercial dealings. The terms that limit consumers' rights and exclude their legal liability must be addressed. Thus, this research aims to study the UK laws and policies in view of serving as model for Iraqi lawmakers and attending to the country's unfair terms in its standard form contracts.

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3.8 Situation of Consumer Protection in Iraq

It has frequently been suggested that many developing countries lack a strong consumer movement, and that powerful multi-national and indigenous producers prevail on undemocratic governments to deny consumer protection to third-world populations, the majority of whom are poor, illiterate, and apathetic, writes S. Sothi Rachagan. This is, at best, an oversimplification; in the case of the United Kingdom, it is wrong.[189] This is said to be the correct account in Iraq, according to Salem.[190]

[189] James Devenney and Mel Kenny, *European Consumer Protection: Theory and Practice* (United Kingdom: Cambridge University Press, 2012), 57-67, accessed June 25, 2016, https://books.google.com.my/books?id=ivSH7PEQ-w8C&pg=PA64&dq=consumer+protection+in+loan+contract+in+uk&hl=en&sa=X&ved=0ahUKEwiMvYW-zaHNAhVl26YKHdvBCckQ6AEINTAA#v=onepage&q=OFT&f=false.

The Iraqi economy has its own problems, challenges and imbalances for wide range of internal and external reasons. Yet, it has yielding unilateral economy despite the availability of resources and varying facilities. It is also noted that the process of identifying the philosophy and orientation of an economic system defines the role of the state in economic management and policies. This is presently an important phase in the economic structuring of Iraq.

The remedies provided by the constitution to economic issues are incomplete. They did not provide complete related laws, and they were not clear and precise. Also, there are discrepancies between the adoption of the market mechanism, transition programs and privatization. There is also lack of clarity in the development plans for the economic sectors, and this resulted in loss and wastage of resources, and failure to achieve growth and development of consumers' protection throughout past years.[191]

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Abod contended that consumer protection provided by civil organizations in Iraq does not match the true protection standards of developing countries. Prior to 2003, civil society organizations were unknown. They usually remain under a parallel line of state's thought. They reflect the state's approach, and this has weakened many of the associations and federations which were seeking the consumer protection of their rights.

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[190] Ali Abd al-Hadi Salem, "Towards an Effective Strategy for Economic Development in Iraq," *Al Anbar University Journal of economic and administrative Science* 4, no. 9 (2010): 1, accessed April 1, 2015,http://www.iasj.net/iasj?func=fulltext&aId=69035.

[191] Ibid

However, several civil society organisations were founded under various names after 2003. Some are just known by their names, while others are still under the authority of a certain person or party, with benefits confined to its founders. However, other organisations have risen to the occasion and formed an umbrella to safeguard consumers. Furthermore, their perspectives are heard through media activities, seminars, and conferences organised by state agencies. There were also committees with missions related to the protection of consumers, building a strong state, and rendering welfare services to the society. Some of these associations are mentioned underneath:[192]

1- National Association for Consumer Protection in Iraq

This association was founded in 08/06/2003 as an independent non-governmental organisation. It is formed by a group of specialists and those who are interested in the field of market and consumer. It adopted the intellectual, cultural, and regulatory approaches in order to work for national development.

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2- Iraqi Association of Defence of Consumer Rights

This is also one of the main associations that were birthed with the functions of civil society organizations in view of supporting the success of the comprehensive development programs (economic, social and cultural). It was founded on 01.08.2003. It was established and managed by the national elite of educated cadres. It is competent in varieties of fields in the protection and confines of consumer rights[193]. In its opinion, the role of law and legislation in protection of citizens and

[192] Salem Mohumed Abod, "Consumer Rights and Methodology for Protection; Cultural Entrance with Reference to Iraq," *Market Researches and consumer Protection Center in university of Baghdad* (2007)

[193] Ibid

institutions is important. It is an integrated legal environment designed to achieve control systems and determine the specifications and criminalization of market offenders.

Abode and Shaker argued that the development of fraud and deception was used by the traders for unique legal rules in fighting the phenomenon, either internationally or internally. The research found that the sanctions provided by the Iraqi legislature through CPL 2010 and Criminal Law are not strict enough to stop these crimes. They also indicated the need for consumers' commitment in contributing to the defence of their rights through different means like collective agreements and non-governmental organization.[194]

3.8.1 Situation of Consumer Protection against Unfair Terms in Iraq

In today's economic environment, there is a usual imbalance in the provider-consumer relationship that favour the seller. The supplier knows more about the service/product. The more complicated the subject, the less likely the consumer is to be able to make an informed judgement or decision on the quality or safety of goods/services. Even having relevant information may not assist consumers in exercising experts' evaluations of the associated dangers.

As a consumer, there is always a need for protection from the other party who is a professional trader because he or she has the expertise and economic capacity over the customer. The result of the imbalance in negotiating power necessitates the protection of the weak side, which is the customer. According to these novel cases,

[194] Salem Mohumed Abod and Rasha Shaker Gilan, "Legal Protection of the Consumer from Commercial Fraud, *"Consumer Protection Center for Market Research* (2013): 1.

there is a need to identify the proper legislative framework for consumer protection.[195]

The Iraqi legal system is restricted to what is known as contract adhesion. Thoughts and judicial opinion concur that contracts are not regarded adhesion contracts unless they are tied to a commodity or facility that is required to be the subject of a legal or physical monopoly. Because adhesion's requirements are not relevant in most circumstances, relying on the notion of adhesion contracts does not safeguard customers from abusive terms.[196]

The justification of contractual duties no longer serves the customer in the evolution of the market. As a result, the bulk of recent legislations prioritised consumer protection via separate legal standards, which encompass a collection of legal restrictions. This was done to protect consumers in a variety of ways. Notably, there are no special restrictions in Iraq to safeguard consumers from trader abuse by informing customers of unfair contract terms. It is therefore critical for the legislature to safeguard consumers by empowering the court over the uneven obligations in consumer contracts, or to use the blacklist of unjust provisions to pursue this development.[197]

Dayih discussed the consumer's rights to dissolve the enforceable contract in different legal systems. He found that there is a departure from the traditional

[195] Alaa Yacoub Yousef, "The Legal Protection of the Consumer in E-Commerce Contracts," *Journal of the Faculty of Law* (2003): 1, accessed May 10, 2015, http://www.iasj.net/iasj?func=search&query=au:%22%D8%A7%D9%84%D8%A7%D8%A1%20%D9%8A%D8%B9%D9%82%D9%88%D8%A8%20%D9%8A%D9%88%D8%B3%D9%81%22&uiLanguage=en.

[196] Ibid

[197] Feras Jabar Karem, "Consumer Awareness and Methods in the Contract," *Risalat al-huquq Journal* no. 3 (2013):

concern for freedom of contract in the second half of the last century. The cardinal rule of contract law allows the consumers to dissolve the enforceable contract within the legal framework of consumer protection laws. This legislation did not ignore the structured organization to reduce the severity of the contravention of the traditional principle. The right to dissolve the contract by the consumer is common, either in the European consumers' protection legal framework or other countries.[198]

The study explains the French judicial system; the consumers' right to dissolve the contract must comply with the principle of good, otherwise consumer will not eligible to get this permission. On the other hand, the second party should prove before the court that consumer is acting in contrast to the good faith, but this is difficult to show in emotions and intent. This therefore makes the legislative rule as a viable option. Therefore, there is need for legislative authority in Iraq to include such permission to provide the basic consumer protection to the new consumer.[199]

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Similarly, Mohammed agreed by explaining the role of ICC no 40 of 1951 in protecting the Submissive Party (consumer) in the adhesion contract, especially the mutual intentions of both parties. He argued that there is insufficient section provided in the law, and due to that, there are two articles available in the said law (166 and 167). In addition, these two articles need to be amended to provide comprehensive protection to the consumer in complicated situations which are always used by traders and institutions to their market advantage.[200] He also emphasized that, there is increase in the use of contract of adhesion and standard

[198] Sulaiman Barak Dayih, "Legislative Dissolve of Contract in the Consumer Contracts," *Faculty of Law of the University of Mesopotamia* (2004)
[199] Ibid
[200] Mohammed Abdul-Razaq Mohammed, "Interpreting the Suspicion for the Benefit of the Submissive Party," *The Rights' message Journal* 3, no. 3 (2011): 1, accessed May 16, 2015, http://www.iasj.net/iasj?func=search&query=kw:%22The%20doubt%22.

form contracts by the traders and corporations, in spite of its direct effects on the society. However, the researcher did not find any clear provision to attend to the problem.[201] This study therefore aims to fill this knowledge gap.

Furthermore, Hamad stated that Article 167 of the ICC 1951 is insufficient to protect the weaker party from unfair contract terms. The clause allows the judge broad authority in removing unreasonable terms from the adhesion contract. According to the study, power might be understood or explained differently by each judge. As a result, the purpose of this study is to advocate for a blacklisted legal system that has to be improved in both developing and developed countries in order to cope with unjust terms in particular.[202]

Mohammed[203] explained the significance of researching adhesion and standard form contracts. He argued that these contracts are widely used by dealers and businesses, as well as official and informal institutions. According to the study, the spread of employing unfair terms is due to a new market technique to decrease costs and set the terms and conditions in their contracts. As a result, this will boost their business. Furthermore, the lack of rule of law has contributed to this situation.

The research discovered that the standard form contract and the new contract forms are distinct from adhesion contracts using a comparative analytical analysis between the Arab and French legal systems. This is the outcome of the Iraqi legislature's

[201] Ibid

[202] Sara Ahmad Hamad "Internet Utilization Contract," *journal of Rafidain for rights* 9, no. 31 (2007): 166-67, accessed May 11, 2015, http://www.iasj.net/iasj?func=search&query=au:%22Sara%20Ahmad%20Hamad%20%D8%B3%D8%A7%D8%B1%D8%A9%20%D8%A3%D8%AD%D9%85%D8%AF%20%D8%AD%D9%85%D8%AF%22&uiLanguage=en.

[203] Radhi khaolah Kadhim Mohammed, "Acceptance in Adhesion Contracts," *Al Hilli Detective Journal for legal and political science* 6, no. 1 (2014): 388-92, accessed April 17, 2015, http://iasj.net/iasj?func=search&page=3&query=kw%3A%22as%22&earliestYear=1650¤tYear=2015&filter=year%3A%222014%22

regulation of technologies and economic development in the Civil Law 1951. Thus, consumers who have been pursued by the unfair terms in these contracts are urging Iraqi lawmakers to respond positively in line with the developments in other countries that have dealt with the unfair terms in consumer contracts.[204]

A study by Friedman comparatively analysed the solutions employed in Canada and that of Federal Republic of Germany, and evaluated which of the systems provides consumers with better protection from unfair standard form contracts. This research mentioned that standard form contracts are prone to inclusion of clauses that are highly disadvantageous to the average consumers. These are difficult problems to be addressed by the law of contracts. Countries, with legal systems which are different from common law and civil law have to deal with the problems created by standard form contracts. In many other countries, these contracts have been a centre of discussion for a long time. The Standard form contracts have been called standardized mass contracts, "boiler-plate agreements" and contracts of adhesion.[205]

To summarise, the Iraqi consumer protection organisation (Civil Law 1951 and Consumer Protection Law 2010) lacks the components of business-to-customer (B2C) transactions. In addition, unfavourable terms in consumer contracts are critical issues that the government must address. There are several attempts being undertaken by industrialised and emerging countries to safeguard customers from unfair terms in contracts; Iraq should follow suit. Consumers are viewed as the weaker party in this era of globalisation. Unfair commercial practises by dealers, institutions, and businesses are obvious. As a result, the weaker party must be

[204] Ibid
[205] Christa Friedman "Unfairness in Standard Form Consumer Contracts: The Causes and Cures. A Comparative Look at the Situation in Canada and the Federal Republic of Germany" (master's thesis, Faculty of Law/ University of Alberta, 1988), 1-186, accessed Jan 26, 2015, [era] education and research archive.

protected from deception and fraud that might jeopardise their interests. This uneven position necessitates studies and research in order to give a functioning framework to government and non-government organisations in order to address this dangerous occurrence. As a result, the current study examined to this point to fill in the gaps.

Even though the unfair terms in the consumer loan contract is of global significance, it has not been deeply studied by previous studies, to provide the necessary background information needed to understand unfair terms in a loan agreement. There is lack of studies in this area of consumer protection over consumer's commercial transactions in lending process. Besides that, most previous studies did not attend to the problem. This study therefore aims to present an in-depth analysis of unfair terms involved in consumer loan contracts. Moreover, it intends to propose a legal framework to overcome the research problem, as provided in this study.

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3.9 Research Framework

Based on the aforementioned discussion, the research presented the working legal research framework of the study. The figure 3.1 below shows the entire process and procedures of conducting legal research to answer the questions and achieve the desired objectives. Initially, it begins with the identification of the problem that require investigation from the researcher, based on this, the problem statement was presented. The First research objective intended to discuss the legal issues of unfairness of standard form loan contract, dominated theories and principles, effectiveness of current Iraqi laws. It achieved by legal analysis and interview protocol with legal informants. Findings of this objective showed weakness in the current Iraqi laws governing unfair contract terms of bank loan contracts.

Therefore, the second research objective studied the comparative consumer protection measures taken against unfair terms included in the personal loan contract with banks in the French and United Kingdom law. It was achieved via comparative legal analysis of the French and UK's legal systems. Accordingly, proposal of solutions for mentioned research gaps stated in the problem statement. Whereas the third research objective examined the Iraqi institutional role in providing consumer protection from the unfairness in a loan contract. It was achieved through legal analysis supported by interview protocol and comparative review from French and UK's model. Lastly, the study provided Enhanced Iraqi's Laws and Institutions governing consumer protection from unfair contract terms of bank loan contracts.

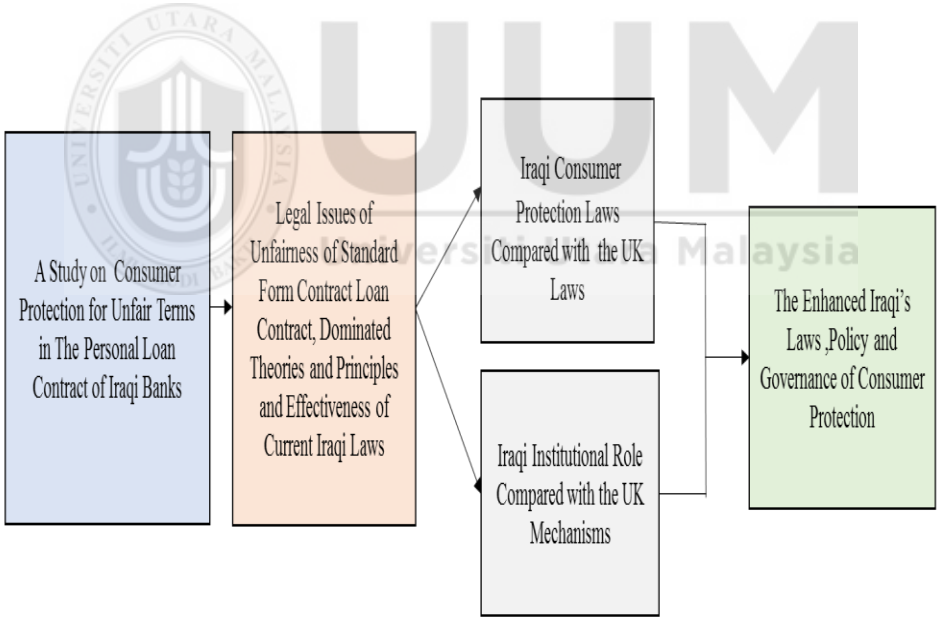


Figure 3.1 Research Framework

CHAPTER FOUR
ANALYSES OF IRAQI LAWS GOVERNING UNFAIR CONTRACT TERMS OF BANK LOAN CONTRACTS

4.1 Introduction

This chapter examines the adequacy of the Iraqi consumer protection law (CPL) 2010, the Civil Code of 1951, and other Iraqi laws dealing with unfair terms in new consumer contracts. This chapter will start with the background and history of legal system in Iraq. Also presented is an analysis of the interviews conducted with a few groups of informants. The chapter also provides background information on the unequal bargaining power and unfair terms in a loan agreement between a bank and its borrowers in Iraq.

The chapter then presents an analysis of the interviews with the following informants: (i) lawyers who are experts in loan contracts, (ii) academicians, (iii) judges and legal officers, and (iv) specialized officers who are in charge of loan contracts. Loan contracts, documents, and cases were also examined. The second research question and second research objectives will provide and will be answer in this chapter. Three important topics were examined: (i) the Iraqi banking sector in general; (ii) The impact of the unfair system for the standard of loan contract; and (iii) Legal process in this country to discussing how to protect consumers against unfair terms in personal loan contracts.

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4.2 Background of the Iraqi Financial System

Iraq, which is located in the Middle East, is a significant oil-producing country in the region. In fact, this country is the one of the richest regions in the world, with a public-sector-dominated economy.[206] This nation has the fifth-largest proven crude oil reserves in the world and is the Organization of Petroleum Exporting Countries' (OPEC) second-largest crude oil production after Saudi Arabia. The onshore oil fields in the southern region of Iraq produce around 90% of the nation's crude oil. The central government in Baghdad is in charge of these domains.[207]

Iraq is now one of the least banked nations in the world despite its richness.[208] The IMF stated:

> *Firms in Iraq have identified access to finance as a major impediment to their growth, a reflection of the underdevelopment of the financial sector, which is dominated by public banks with private commercial banks currently playing an insignificant inter-mediation role.*[209]

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The most crucial element of the financial system in Iraq is the banking industry. The market is dominated by seven prominent state-owned banks, including Rashid Bank, the Trade Bank of Iraq, and Rafidain Bank.[210] Which continue to represent the majority of the assets, loans, and deposits in the banking sector.[211] Private Banks in Iraq, on the other hand, are relatively tiny, with many having been created only lately. In Iraq, there are nine Islamic banks, four of which are the most capitalized.

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[206] Simon White, "Micro, Small and Medium-Sized Enterprises in Iraq; A Survey Analysis," *Private Sector Development Consultant to the ILO Regional Office for Arab States* (2012): 1-31, http://www.psdc-iraq.org/sites/default/files/ILO%20Iraq%20MSME%20Analysis%20Final.pdf.

[207] Michael Mobilia and Lejla Villar, "Iraq's Oil Production Has Nearly Doubled over the Past Decade," U.S. Energy Information Administration (EIA), 2019, https://www.eia.gov/todayinenergy/detail.php?id=37973.

[208] Robert Looney, "Postwar Iraq's Financial System: Building from Scratch," *Faculty and Researcher Publications of Calhoun* 12, no. 1 (2005): 134-48, https://core.ac.uk/download/pdf/36733202.pdf.

[209] Gazi Shbaikat, Salim Dehmej, and Amgad Hegazy, "Selected Issues," *International Monetary Fund .Publication Service* (Washington, 2019), https://doi.org/10.1007/978-1-4684-3821-5_16.

[210] Khalaf, "The Determinates of Financial Development in Iraq"; Alwattan Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans," economy, 2018, https://www.alwatanvoice.com/arabic/news/2018/10/14/1182464.html.

[211] Gazi Shbaikat, Salim Dehmej, and Amgad Hegazy, "Selected Issues," *International Monetary Fund .Publication Service* (Washington, 2019), https://doi.org/10.1007/978-1-4684-3821-5_16.

As a result, the financial system in Iraq can be deemed smaller when compared to those in other Middle Eastern and North African (MENA) countries.[212]

According to the IMF Staff Report for 2019, the credit for the economy is only 9% as the proportion of GDP of this country. The study also highlights Iraq's continued struggle and the possibility that its economy would continue to be severely stressed.[213] IMF[214] argued:

> *Bank regulation and supervision should be strengthened and refocused on the banks. Also, improving credit information and strengthening legal procedures should encourage banks to relax their collateral requirements and facilitate access to credit.*

Due to an insufficient legal framework, Iraq has been observed to have weak oversight over banking industry products. The CBI should make a genuine effort to safeguard consumers against standard form personal loan contracts, which are now treated the same as traditional contracts. In this environment, developing and reforming consumer protection regulations in Iraq's banking business is critical. The reasons for the existence of the undeveloped financial sector in Iraq require further investigation.

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According to the researcher, despite Iraq's enormous resources, the country's financial system, notably the banking sector, is underdeveloped. The government's focus on the military sector as a result of the country's fragile security can be ascribed to the underdevelopment.[215] Other industries, like the banking sector, have received less attention. Another factor is the lack of a competent legal framework in

[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Khalaf, "The Determinates of Financial Development in Iraq"; Alwattan Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans," economy, 2018, https://www.alwatanvoice.com/arabic/news/2018/10/14/1182464.html.

place, as well as the existence of some consumer unfairness issues, such as a lack of skilled legal supervisory system specialists.[216]

The financial system, sometimes known as the system, covers a wide variety of topics, from standard commercial bank services to mortgage finance and other associated services like discount stores.[217] Like the nervous system of the human body, the banking industry's financial system is a component of a nation's economy. The banking industry is the centre of the financial system, which also acts as its nervous system. The system is most important to the general public and economy.[218] The financial infrastructure in Iraq, however, is lacking and has to be developed in all respects, including credit registries, collateral frameworks, legal systems, consumer protection, and auditing capabilities. A reform must take into account the political climate of the nation.[219]

The creditor power and information theories are not incompatible, claim Simeon, Caralee, and Andrei. Stronger ex-post creditor rights and improved ex-ante (and interim) information can both aid in the growth of the loan market. While some governments could focus on judicial systems by giving creditors more authority, others might focus on information institutions. First, less developed nations with weak legal systems would find it difficult to create a successful lending channel based on ex-post creditor rights and might instead rely on information sharing to guarantee the proper operation of their credit markets. Richer countries, on the other

[216] Ahmed Ali, "Banks, Credit and Financial Depth between Iraq and the International Experience," *Journal of Monetary and Financial Studies* 2018, no. 3 (2018), https://cbi.iq/documents/journal of monetary and financial studies. july 2018.pdf.
[217] Latfe Jabar, "Funding and Financial Reform Process in Iraq," *International Journal of Advances in Management and Economics IJAME* 5, no. 6 (2018), http://managementjournal.info/index.php/IJAME/article/view/62/62.
[218] SalisuMalami and Zuryati Mohamed, "Legal Regime for the Protection of Banking Consumers in Nigeria: An Overview," *UUM Journal of Legal Studies* 8, no. 4 (2017): 1-23, http://www.uumjls.uum.edu.my/images/vol82017/d-87-112.pdf.
[219] Khalaf, "The Determinates of Financial Development in Iraq"; Alwattan Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans," economy, 2018, https://www.alwatanvoice.com/arabic/news/2018/10/14/1182464.html.

hand, may establish a more functioning bankruptcy regime to increase creditor power.[220]

Second, countries with distinct legal traditions may specialize in various business social control tactics. For instance, nations that adhere to French civil law rely on ownership and regulations from the state. Credit markets give a chance to test these hypotheses since creditor power theories deal with legal creditors' rights and enforcement through courts. On the other side, information theories discuss compulsory information disclosure and frequently include state-owned organizations for information sharing.[221]

However, it is anticipated that during the next two years, as Iraq's economic recovery gains momentum, credit growth will steadily accelerate. Therefore, policies that encourage growth are likely to result in a rise in the demand for borrowing. In addition, structural problems that restrict the financial industry's growth and involvement need to be fixed. In order to reinforce lenders' and borrowers' rights and lending practices, new regulations (such as bankruptcy laws, consumer protection laws, and corporate governance practices) may be established. This will need adequate monitoring.[222]

The lending laws' goal is to establish a more open interaction between banks and finance firms and their clients in order to increase consumer trust in banks and the

[220] Simeon Djankov, Caralee McLiesh, and Andrei Shleifer, "Private Credit in 129 Countries," *Journal of Financial Economics* 84, no. 2 (2007): 299–329, https://doi.org/10.1016/j.jfineco.2006.03.004.
[221] Ibid.
[222] International Monetary Fund. Middle East and Central Asia Dept, *Regional Economic Outlook, October 2018, Middle East and Central Asia* (n.p.: International Monetary Fund, 2018), 1-30, https://books.google.com.my/books?id=Net1DwAAQBAJ&pg=PT43&lpg=PT43&dq=Finance+and+Financial+Sector+D.

legitimacy of the financial system.[223] Thus, as noted by a few Iraqi parliament members with expertise in the economy, the accepted standard international rules must be adopted into the country's financial system:[224]

The failure of local banks made the Iraqi market in need of investment for foreign banks, and the reason for their decline in the country is the failure of the Iraqi banking sector, the fact that the foreign investor is looking for a safe and advanced banking environment to facilitate his work and keeps his money.

The parliamentarians emphasized the necessity of opening the Iraqi market to foreign banks with an investment focus in order to assist the attraction of investment firms and the transfer of experience to local banks. Such a move might also help the investment process advance through loan funding, money transfers, and the application of cutting-edge banking strategies that can hasten transaction completion.[225]

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According to Aziz Mayahi, the member of committee on Economy and Investment Member of the Committee on Economy and Investment[226] stated that,

> *Iraq needs foreign banks with investment character to support the investment process in the country, adding that local banks lacked not extend technologies that work with the Universal, and that investment needs to be a solid legal environment and the political and security stability and developed banking sector, to enable companies to come to invest, because they are looking for a safe environment in which the rule of law and modern systems.*

[223] Ammar Khalaf and Aqeel Muhummad, "Early Warning Report for the Banking Sector First Chapter 2018" (Baghdad, 2018), https://cbi.iq/static/uploads/up/file-153682680559797.pdf.
[224] Shatha Khalil, "The Reality of the Banking System in Iraq," Rawabt Center, 2016, https://rawabetcenter.com/en/?p=1434.
[225] Ibid.
[226] Ibid.

Given the above points, several issues could be identified as follow:

Iraq is suffering from a weak financial and banking sector that reserves the borrowers' rights. Controls on banking industry products in Iraq have been ineffectual due to the country's poor legal structure. After the war, the government was fully occupied with many security challenges, which reflect the effects that have burdened its responsibilities and obligations towards the citizens.

The credit market is beginning to build itself to stand and take its responsibility to partner with the government in transforming the fiscal sector. Such progress could be achieved with the establishment of a good base for offering loans, specifically personal loans, which will help to cover the citizens' living expenses.

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4.3 Iraqi Political and Security Situation

Iraq has been experiencing a twin shock since mid-2014 as a result of the battle with the so-called Islamic State of Iraq and Syria (ISIS) and the significant decline in world oil prices. The extremely difficult security and political circumstances, which have existed for a number of years, are made worse by the twin shock.[227] Three million people have been internally displaced as a result of the armed war, and an additional eleven million people need humanitarian aid. Since the start of the conflict, living conditions have significantly worsened throughout the nation, and the government's capacity to deliver essential public goods and services has been severely limited. In addition, the violence has seriously harmed the nation's

[227] Due to the Iraqi army fighting ISIS, the security situation of Iraq is unstable. In 2014, the Iraqi government faced the big challenge of fighting ISIS in the north and northwest of the country where, in fact, this is still continuing in 2019.

productive assets and infrastructure, interfered with both domestic and international commerce, and eroded investor trust.[228]

Despite the government' consistent efforts and hopeful advances, the Iraqi economy still faces significant risks and challenges, including a further drop in oil prices, political unrest, security threats, and severe administrative capacity limitations.

4.4 Legal Organization of the Consumer Protection from Unfair Terms in the Standard Form Loan Contract

The preservation of protected relationships and respect for people's rights with regard to interest safeguards are the goals of contract law and consumer protection. The rules that restrict a legal or natural person's conduct or inaction to protect consumers are the source of regulations that safeguard the customer while also balancing the responsibilities and rights of the contractual parties. These rules are grouped into three categories: (i) the constitution, (ii) the legislation, and (iii) the regulations and directives.[229]

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Any legislation passed by the legislature must comply with the Iraqi constitution, which is the country's highest law; otherwise, it would be deemed to be unconstitutional. The bill of rights in the Iraqi constitution outlines the goals and ambitions of the society as well as how people, communities, and the state should interact. It demonstrates the Iraqi state as a humane society that cares for its

[228] Robert Looney, "Postwar Iraq's Financial System: Building from Scratch," *Faculty and Researcher Publications of Calhoun* 12, no. 1 (2005): 134-48, https://core.ac.uk/download/pdf/36733202.pdf.

[229] Ismat Abdul Majid, *Theory of Contract in Arab Civil Laws (Comparative Study)* (Beirut: Dar Al Kotob Al Ilmiyah, 2015), 1-704, https://books.google.com.my/books?id=FvhGDwAAQBAJ&pg=PA31&lpg=PA31&dq=%D8%AF%D9%88%D8%B1+%D8%A7%D9%8.

residents, especially by respecting their dignity and providing for their basic needs, including financial transactions.[230]

The broad commitment to protect and uphold the rights of its residents is stated in the constitution. The Iraqi Constitution of 2005 expressly states that human rights must be protected and preserved. The rights to life, security, and liberty are mentioned in Article 15. According to this article, the legislator combines the rights to life, security, and liberty into the following statement: "Everyone has the right to life, security, and liberty." Without the approval of an appropriate legal authority, the right to life cannot be denied or limited.

In establishing the aforementioned rights, the Iraqi constitutional legislator followed the lead of international and regional human rights agreements and declarations. According to Article 19, "the judicial system is independent, and every individual has the right to litigate." Additionally, Article 39 gives everyone the freedom to create associations and join them in conformity with the laws that regulate their interactions.[231] Research suggests that the constitution also contains sound guidelines for consumers, especially those who are signing standard form personal loan contracts. In accordance with the Iraqi constitution, consumers have the right to get fundamental financial protection through fair dealing or the freedom to bargain for their rights. Additionally, the client should be shielded from unfair terms in bank contracts for personal loans.

[230] Ali Hassan and Ali Majeed, "Constitutional Protection of the Public Order Idea," *Journal of Bautalhikma for Legal Studies* 44, no. 5 (2018).

[231] Shamsalden Aziz, "A Critical Evaluation of the Legal and Sharia Aspects of the Iraqi Islamic Banking System, Using the Case Studies of Malaysia and Bahrain" (PhD diss., school of law, 2017), in Bangor University Digital Repository, http://e.bangor.ac.uk/9836/1/Salh%20PhD%202017.pdf.

4.4.1 Iraqi Civil Code No 40 of 1951

The ICC is regarded as a significant code of civil provisions; it governs individuals' financial habits and achieves stability in all interactions, reflecting safety and peace. The historical development of various laws gave rise to the ICC code. Its rules have elements that come from French law and others that come from Egyptian law. Islamic law, more notably the Hanafi school of thought, had an impact on the ICC legislative as well. The code also makes an effort to draw on Latin legal precedent, which leads to inconsistencies and a lack of coordination across its parts.[232]

However, many researchers have commented that the provision of ICC, which was enacted in 1951, has remained static and not been amended to suit the recent time. The provision no longer serves the emergent issues that have been affecting the Iraqi citizens, hence the aggravation and inflation in its texts.[233]

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In regulating contractual obligations, the ICC adopts some principles considered as predominant in a contract. One of the principles is the "authority of will" a principle that most developing and developed countries intend to depart from in order to protect the weak party from being affected by the development of economic issues in the process of concluding contracts.[234] The principle of "authority of will" means that *will* alone is sufficient to establish a contract and legitimate conduct in general. Such a notion is known as the rule of consensual contract, which indicates the free

[232] Ahmed Ali, "Banks, Credit and Financial Depth between Iraq and the International Experience," *Journal of Monetary and Financial Studies* 2018, no. 3 (2018), https://cbi.iq/documents/journal of monetary and financial studies. july 2018.pdf.

[233] Tahseen Smaeil, "Negative Inflation in the Provisions of the Iraqi Civil Law and Mechanisms for Its Treatment" 2018 (2018), https://doi.org/10.23918/ilic2018.10; Muhammad Ali, *Civil and Judicial Protection for the Consumer of the Unfair Terms Comparative Study*, 1st ed. (Egypt: Center of Arabic Studies, 2018), http://sdr.shjlib.gov.ae:8080/pubs/alhimayat_almadaniat_walqadayiyat_lilmustahlik_min_alshurut/78/.

[234] Zkry Mohammed and Nasir Cactus, "Civil Protection of the Familiar Conditions in Commercial Contracts," *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 1, no. 1 (2009): 45–88, https://www.iasj.net/iasj?func=fulltext&aId=37004.

will to determine the consequences of a contract or act a principle known as *pacta sunt servanda.*[235]

Thus, they will have the greatest authority in the formation of a contract and its implications, and expand to all legal relations, even if not contractual. The *pacta sunt servanda* concept permits parties to enter into any agreements they see fit, free from restriction by the specific contracts that the Civil Code's legislators have categorized as acceptable forms of agreement.[236]

As such, the free will of parties to determine the effects of a contract shall not be constrained by the effects of the legislator on a contract; rather, it shall have the power of freedom to narrow, expand, or delete such effects. The will also has the change a contract's after-effects.[237] For instance, Article 1 of the ICC governs the contracting process between parties and specifies that "When a contract is signed, it becomes legally binding, and neither party may renounce or change it unless required by law or by mutual consent. Thus, the principle of the authority of contractual should be based on two essential elements of contracting:[238] the element of freedom and the element of equality.

The element of freedom: Freedom is the cornerstone of contracting in the sense that a "free will" dominates all rights and obligations. Therefore, no one is bound by a contract to which he or she is not a party, and no one acquires a right from a contract

[235] Abdul Razzaq Al-Sanhouri, *Mediator in the Explanation of the Civil Code: Sources of Obligation,* 1st ed. (Eygpt: House of Egypt Rise for Printing, Publishing & Distribution, 1952), https://www.goodreads.com/book/show/34112526.
[236] Ali Abdullah, "The Legal Protection of the Weak Party in the Contractual Relation," *Route Educational & Social Science Journal* 6, no. 5 (2019): 376–404, https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.
[237] MuhhamadFawas, "Arbitrariness in Adhesion Contracts," *Journal of the Unbar University for Legal and Political Science* 2, no. 3 (2017), https://iasj.net/iasj?func=fulltext&aId=132582.
[238] Ajood Azwawo and Aiet Mawhob, "The Role the Will in Forming a Contract" (University of Bgayet, 2017).

in which he or she has not participated. The "free will" is the capacity to reach a decision after carefully weighing the interests of the parties and striking a balance between them, independent of outside pressure or compulsion. Because the interest of society, or the general interest in the society, comprises of all of the individual interests of the contracting parties, the interests of society are realized in fulfilling the interests of both parties.[239]

The element of equality: The implementation of absolute equality is difficult to achieve, so it is not intended here to achieve real equality, nor that is close to actual or real equality before the law. It is legal equality and not economic equality that ultimately ensures public interest because individual interest is the basis of public interest and can only be achieved if people are considered equal before the law in all of their contracts.

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Many laws and statutes have been influenced by the principle of authority of will. The most influential of these laws was the French Civil Code (codification of Napoleon in 1804). In Article 1134 of the law, the title of the principle of the authority of will was provided in the initial legal acts. It stated: "If the agreement is legitimate, it is considered as law for those who contract."[240]

The Egyptian legislature approved this in the Egyptian Civil Code No. 131 of 1948, which states in the first paragraph of Article 147 that "the contract is the law of the contracting parties, it may not be revoked or amended except by the agreement of the parties or for the reasons determined by the law," as provided by the law in Jordanian

[239] Stigall, Dan. "Iraqi Civil Law: Its Sources, Substance, and Sundering B." *Law & Policy* 16, no. 1 (2004): 1–72.
[240] Stigall, Dan. "Iraqi Civil Law: Its Sources, Substance, and Sundering B." *Law & Policy* 16, no. 1 (2004): 1–72.

Civil Code No. 43 of 1976. According to Article 241, "if the contract is valid, no party may withdraw, amend, or annul the contract, except by mutual consent, by suit, or in accordance with the provisions of the law."[Abd El-Wahab Ahmed, "Contract sanctity and freedom under Islamic law and the doctrine of frustration in Sudan," Source: Arab Law Quarterly 1, no. 1 (1985): 51-59.] While they all enacted a unique regulation (intended to safeguard the disadvantaged party in the consumer contract), some went further to provide further protection against unfair terms in their bank credit agreements.

It is clear through the review of these articles that the provisions of law have approved the principle of the authority of will in the contract. It also provides highlight on the strength of the contractual relationship and bind it with the will and also stress the freedom of contracting parties.

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4.3.1.1 Consumer Protection for Loan Contract as Standard Form Contract

This section reviews the previous discussions on to the legal principles that represent the bases of the ICC, particularly the protection of consumer in a personal loan contract. The Iraqi legal system, on the other hand, is restricted to what is known as "adhesion contract." A contract is not considered an adhesion contract, in accordance with contemporary thought and judicial opinion, unless it is linked to a good or service that is the target of a physical or legal monopoly.[241]Relying on the idea of adhesion contracts does not guarantee that clients will be protected against unfair

[241] Umkalthoom Sabeeh, "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract," *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91, https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan; "The Legal Rules in the Handling of Unfair Terms" (University of Karbala, 2015), http://law.uokerbala.edu.iq/wp/wp-content/uploads/2015/02/images_pdf-mesg_4.pdf.

terms because the parameters of an adhesion are often irrelevant. [242] Most commentates have criticized the lack of clear definitions about a standard form contract and adhesion contract.

In explaining the role of ICC No 40 of 1951 in protecting the weaker party (consumer) in the adhesion contract, Mohammed argued that there are insufficient sections provided in the law with regards to consumer protection in a contract, and that there are two articles available in the said law (166 and 167) particularly the mutual intentions of both parties.

The laws must be changed to give consumers complete protection in complex situations, which are always exploited by businesses and institutions for their own commercial gain.[243] Mohammed also emphasized that there is an increased use of adhesion contracts and the standard form by traders and corporations, in spite of the direct effects of the contracts on the society. However, the researcher did not find any clear provision to tackle this issue.[244]

Hamad further argued that the ICC 1951's Article 167 is insufficient to shield the weaker party from unfair contract terms. The clause allows the judge broad authority in removing unreasonable terms from an adhesion contract. Hamad then contended that the power may be understood differently by each judge. As a result, this study

[242] Ibid
[243] Mohammed Abdul-Razaq, "Interpretation of the Party's Interest Doubt," *Risalat Al-Huquq Journal* 3, no. 3 (2011): 152–63, https://www.iasj.net/iasj?func=fulltext&aId=42458.
[244] Ibid.

contributes to the necessity for developing and established countries to enhance their national legal systems in order to cope with unfair lending terms.[245]

Mohammed[246] illustrates why adhesion and standard form contracts are important to comprehend. He contends that both formal and informal organisations, enterprises, and merchants frequently employ these contracts. According to the poll, the expansion of adopting unfair terms is due to the new market's techniques for reducing costs and dictating terms and conditions in their contracts. As a result, these actions will benefit businesses. The aforementioned issue has also been exacerbated by the weak application of the rule of law.

As a result, compared to standard form contracts and novel contract forms, adhesion contracts are distinct. The Civil Law of 1951, which the Iraqi government has been in charge of, has overseen the country's economic and technical achievements, leading to this. Therefore, victims of the unfair terms in these contracts are pleading with Iraqi lawmakers to act positively in line with the advancements of other countries who have dealt with similar situations by addressing the unfair terms in consumer contracts.[247]

In fact, the interviews provided evidence that the use of these ideas is actual. When asked about the legal principles that have been considered in regulating a consumer loan contract in the Iraqi Law, the authority of will, freedom of contract, and adhesion contract are allegedly prevalent in Iraq, according to R1, R2, R3, R4, and

[245] Sara Ahmad Hamad, "Internet Utilization Contract," *Journal of Al Rafidain for Rights* 9, no. 31 (2007), https://www.iasj.net/iasj?func=fulltext&aId=37413.

[246] Khaula Khadum Mohammed, "Acceptance in Contract Compliance," *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 6, no. 1 (2014), https://iasj.net/iasj?func=fulltext&aId=90495.

[247] Ibid

R5 of the lawyer group of informants. The academicians (R6) added that (i) good faith and (ii) default and coercion could be considered beneficial to consumers if they are applied in a separate regulation to protect the consumers of a personal loan contract. R4 further argued that neither the standard form contract in general nor the personal loan contract in particular had definitions.

It is first suggested that the standard form contract be specified as such in this study. This type of contract binds the weaker party (customer) to the terms and conditions that the stronger party (bank) has negotiated in advance without engaging in any prior talks. By exploiting the necessity and urgency of need of a consumer to the service or money which are monopolized by the stronger party.

4.3.1.2 Standard Form Loan Contract

The banking sector in Iraq has witnessed a rapid and significant development in the field of granting of personal loans. However, the developments come with a new threat to consumers' financial situation[248], and the Iraqi legislator was required to keep pace with this development.[249] Some economists and solicitors have persisted in comparing negotiated "individual contracts" with loan-form contracts in the current dispute.[250] However, other analysts acknowledge that the loan-consumer type contracts provide unique dangers and issues. With differing degrees of emphasis, the issues have been attributed to (i) unequal negotiating power, (ii) failure to discuss the

[248] Ammar Hamad Khalaf and Azhar Hassan Ali, "Financial Inclusion and Economic Development in Iraq," *International Journal of Science and Research (IJSR)*, no. December 2018 (2017), https://doi.org/10.21275/ART20177491.
[249] Shamsalden Aziz Salh, "A Critical Evaluation of the Legal and Sharia Aspects of the Iraqi Islamic Banking System, Using the Case Studies of Malaysia and Bahrain" (Bangor University, 2017), http://www.llgc.org.uk/index.php?id=4676.
[250] Abdul Razzaq Al-Sanhouri, *Mediator in the Explanation of the Civil Code: Sources of Obligation*, 1st ed. (Eygpt: House of Egypt Rise for Printing, Publishing & Distribution, 1952), https://www.goodreads.com/book/show/34112526.

terms of the contract, (iii) the transaction's "take-it-or-leave-it" premise, and (iv) the reality that most keywords are never read.[251]

The loan contract remains a distinct contract under the French Civil Code, despite the French legal system receiving criticism. The agreement in question is a result of Roman law, and under the standards of that system, it is official and not voluntary. As Roman law evolved, the formal form of contracts was excluded from the delivery process. The law in Iraq finally inherits his predicament.[252] The Iraqi Civil Code classifies a loan contract as one of the specialized contracts that fall within possession. The International Criminal Court (ICC) defines "loan" broadly in Article 684 as "where a person gives to another person a designated definite exchangeable thing which is consumed by comparable thing of which he will return (restitution)." The law's fundamental weakness in dealing with modern society, where several various forms of loan contracts exist, is that the article does not identify the different types of loans.

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A customer must abide by the laws and regulations that are issued by the CBI and the bank administration, according to an interview with bank officers R14, which showed that banks in Iraq are offering many different types of loans under the ICC and the CBI. R15, in view that the personal loan contract is one of the easiest contracts for the bank and borrower because it required a signature and certain collateral to get the loan sum.

[251] Sohair Hasan, "The Role the Will in Forming a Contract" (University of Bejaia, 2017), http://www.univ-bejaia.dz/dspace/bitstream/handle/123456789/3203/دور الإرادة في إنشاء العقد.pdf?sequence=1&isAllowed=y.

[252] Muhammad Ali, *Civil and Judicial Protection for the Consumer of the Unfair Terms Comparative Study*, 1st ed. (Egypt: Center of Arabic Studies, 2018), http://sdr.shjlib.gov.ae:8080/pubs/alhimayat_almadaniat_walqadayiyat_lilmustahlik_min_alshurut/78/.

When asked about the definition of a personal loan, R 17 said:

> *A contract between the bank and the borrower and is executed in a specific format which is consistent with the nature of this contract. The amount of the loan is prepared in advance for the offered personal loan sum by the bank to the Borrower. The interest rate and the fees of the banking procedures shall be deducted from the total amount of the loan. It also includes several terms and conditions required by the borrower to provide guarantees to the bank; including a written authorization of the bank to perform the necessary procedures in terms of deduction of loan instalment and the calculation of the value of the loan with a change in interest rate if necessary. He or she is also obliged to provide credits that cover the value of the loan, such as mortgaging and providing a bond guarantees and other collateral from the consumers to return if the loan is not repaid by the borrower; there are other conditions that must be signed by the Borrower because they are considered to be the pre-conditions set by the Bank Committee.*

The above point was concurred by R15 and R16. R14, who are the head officers of the bank:

> *a loan that is given to individual customers, where repayments are made out of salary and end of service indemnity and/or any other verifiable regular income from a well-defined source. In addition, this loan shall be provided as per an application by the customer to be approved by the bank or the finance company, and it should be drafted in the manner set out in the bank's guidelines and regulations or set by the law.*

Furthermore, there is a need for greater explanation in a way that provides a clear comprehension of the loan contract's provisions, classifications, and phrases. The CPL 2010 does not include loan contract clauses or the consumer's right to be protected from unfair terms. In order to decide on the issue of unfair terms on the general rules pertaining to the loan contract mentioned in the ICC no 40 1951 (Articles 684, 686, 688, and 692) that were mentioned earlier in this research, the judge should independently determine the specific provision in the ICC that applies to the personal loan contract.

The argument was confirmed by the academicians interviewed in this study (R6, R7, R8, and R9) and by the judges interviewed (R10, R11, R12, and R13). In general, these respondents agreed to the inadequacy of the Iraqi laws in terms of providing minimum consumer protection in concluding a personal loan contract. R10 stated,

> *The Iraqi laws lacked the right of consumers of loans in general and consumers of personal loan in particular in terms of the willingness in protecting them from the unfair terms and arbitrary procedures adopted by the banks recently.*

One law academic, R6, criticized the ICC and CPL 2010:

> *How come the law does not even give attention in its provisions to the issue of unfair terms in the personal loan contract? Adding to that, the lack of a law that regulates the unfair terms included in the personal loan contract will cause many legal problems that may cause serious effects to the loan consumer's financial interests.*

The above statement was concurred by R7 and R8. Where, the judges interviewed (R11, R12, and R13) also agreed with R10, another judge, who asserted:

> *Our task is difficult to devise the provisions and definition for the personal loan contract; the provisions of the loan contract contained in the Iraqi Civil Code 1951are rigid and old. They need to make an important amendment to keep pace with the fast economic movement and sophistication in the financial market that victimize the consumer who represents the weaker party in the contract and these amendments will also facilitate our mission as judges. They added; several countries have also enacted laws and regulations to protect consumers of the loan from the various unfair terms and conditions that exist frequently in those contracts*.

A personal loan contract in standard form implies that no one may intervene without the specific authorization of the law, according to R4, a civil law specialist with years of experience." The researcher then inquired as to how far Iraqi law had replied to the contract. He commented,

> *This form is new in the contract law theories and these provisions now are very old, it needs more explanation from the legislature to include the terms standard form in the amendments. It should be mentioned expressly as exclusion from the rest contracts because*

> *now not just the adhesion contract that include unfair terms but nowadays all standard form contracts include some unfair terms, and it required an urgent intervention from the legislature side and another interested institutions that work in this case or care about the consumer protection from unfair terms in the standard form contract.*

Another interviewee, a judge and an academic at the same time, R11, stated:

> *The issue of unfair terms is not new in this field. However, there many researchers and scholars around the world generally and in Iraq specifically who wrote about it in their studies and called for the legislature attention. Some of the developed and developing countries are responding differently in their laws and regulations by including consumer protection from unfair terms in the standard form contracts provisions. But the Iraqi legislature not responding yet.*

The personal loan contract is unique from standard contracts in a number of respects. The loan contract binds both parties and is both a consensual contract and a standard form contract. Based on the aforementioned, it would be advantageous to create legislation in Iraq that clearly define a personal loan contract, as the personal loan contract has a distinct legal nature. Given the aforementioned considerations, Following is the study's definition of a personal loan contract: A personal loan is a service that gives the borrower money to deal with immediate and important financial needs. By signing this agreement, the borrower allows the bank to benefit from the loan service while also agreeing to refund the equal of what he got plus a certain percentage of interest as loan contract insurance.

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4.4.2 Consumer Protection Law no 1 of 2010

Several laws have been adopted in Iraq, including those addressed in Articles 15 and 109 of the 2005 Constitution. One of the laws that resulted from the Iraqi constitution is the Consumer Protection Law (CPL) No. 1 of 2010, which addresses consumer

protection.[253] Many scholars in law agree with this viewpoint.[254] The CPL No. 1 of 2010 was released with the intention of safeguarding the weak party in a consumer contract (i.e., the consumer as the main constituent of this contract). Furthermore, consumers are being denied essential rights and legal protections guaranteed by most laws around the world.

However, the law's provisions have not resulted in the expected protection from inaccuracy. Additionally, the legislation ignores the specific fundamental rights that a borrower under a standard form loan contract holds, which are sometimes referred to as consumer protection legislation. Consumer protection laws, generally speaking, aim to control the interaction between a consumer and a professional party, the latter of which is in a stronger position in terms of knowledge in all areas of what he or she provided to the first party because professionals typically operate in a predictable and standardized manner. In order to protect consumers against unfair terms in a standard form contract, this part reviews the definitions of important consumer protection phrases and evaluates the efficacy of the provision.

4.3.2.1 Consumer

A consumer is defined in Article 1(s5) as "a person or entity who acquires goods or services for utilization." A consumer might thus be a natural person or a legal entity. The legislator has taken into account the professional and, as evidence, the words (for the purpose of utilisation) stated without identifying the intention of consuming the goods and services when providing an introduction to the definition of the

[253] Razaq Ahmed, "Consumer Protection Is Right from Human Rights," Al hewar, 2010, http://www.ahewar.org/debat/show.art.asp?aid=229239&r=0.

[254] Naseir Khalil and Sameer Abdullah, "A Critical Reading of the Scope of Civil Protection in Iraqi Consumer Law: A Comparative Research," *Journal of Alsharja University for Legitimate and Legal Sciences* 12, no. 1 (2015): 150–85; Khalid Majeed and Ali Hamza, "Preventive Criminality in the Iraqi Consumer Protection Act," *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 9, no. 1 (2017): 301–25, https://www.iasj.net/iasj?func=search&query=kw:%22Preventive criminality%22.

consumer. According to this idea, both the supplier of the items for business reasons and the customer are provided with goods and services for their personal needs and those of their families.

4.3.2.2 Supplier or professional

Identifying the professional or supplier is one of the most important reasons why legislators advocated for consumer protection legislation. As a result, the law prioritized the definition of this party after the definition of the consumer. The phrase supplier was utilized, as it was in the CPL. In this regard, the Iraqi legislator defined the term supplier as follows in Article 1(s6): "Every natural person or legal entity, a manufacturer, importer, exporter, distributor, seller, or service provider, whether original or mediator or agent."

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In the current study, researcher acknowledged that the CPL performs well when the obligation is allocated to all individuals who enter into a legal connection with the customer, such as agent and mediator. Borrowers could benefit from the Act because it includes the service provider, which means that the banks are involved. Borrowers could benefit from the Act because it includes the service provider, which means that the banks are involved.

4.3.2.3 Consumer protection

Consumer protection is defined by the Iraqi government in Article 1(4) of the CPL as any action that "maintains the rights of consumers and prevent damage them." Findings of the research[255] have shown that the role of consumer protection laws is to

[255] Khalil, Naseir, and Sameer Abdullah. "A Critical Reading of the Scope of Civil Protection in Iraqi Consumer Law: A Comparative Research." Journal of Alsharja University for Legitimate and Legal Sciences 12, no. 1 (2015): 150–85.

recognize the customer's rights, maintain them, and prevent the consumers from being harmed. The purpose of the law is to prevent or lessen harm by imposing remedies and penalties on the affected parties.

The lawmaker also specifies the Act's aims, which are similar to those stated in Article 1(4). Article 2(1) states, "This law's goals are to protect consumers from harmful unlawful practised and to uphold their fundamental rights as consumers. The legislation's goal is to protect consumers from any actions that might harm them. In this scenario, the legislator's goal is to protect the consumer from harm by preventing harmful behaviour[256]. This provision is considered better than Article 1(4).

One of the goals of Iraqi legislation, as stated in Article 2(2) of the CPL, is to enhance "the level of consumer awareness." Although it doesn't say how or who will be in charge of the effort, this sentence leaves up the possibility that the law will increase awareness.[257]

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This legislation applies to all natural and legal people who are producing or processing, purchasing or selling, marketing or importing, giving services or advertising, as stated in Article 3 of the CPL." This article has been critiqued for failing to include the party contracting with the entities.[258]

[256] Khalid Majeed and Ali Hamza, "Preventive Criminality in the Iraqi Consumer Protection Act," *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 9, no. 1 (2017): 301–25, https://www.iasj.net/iasj?func=search&query=kw:%22Preventive criminality%22.

[257] Ahmed Hashem and Muthanna Abdulkadhim, "Consumer Protection from Misleading Advertisements," *Journal of Alqadesya for Law and Political Sciences* 9, no. 2 (2018): 201–24, https://iasj.net/iasj?func=fulltext&aId=165851.

[258] Tariq Kazim, "Study in the Procedural Provisions of the Action Consumption Incidents A Comparative Study Under Iraqi Consumer Protection Act No . 1 of 2010," *Iraqi Journal for Market and Consumer Protection Research* 8, no. 1 (2016): 76–92.

The Iraqi laws stipulates in the third chapter of the CPL that this section is aimed to summarize the consumer's rights in Article 6 of the law. According to the article, the lawmaker focuses on the following six crucial consumer rights: the right to select, the right to after-sale services, the right to lawsuit, the right to a guarantee, the right to return, and the right to ask questions.[259]

Most consumer protection laws, particularly in industrialised nations, state a customer's right to seek compensation for damage(s), however these laws differ in how they deal with such rights in terms of their status and position to recognise them. According to Article 6 (2) of the CPL:

> *To the consumer and all any interested party, in case did not obtain the information stipulated in this article to return the goods in whole or in part to the supplier and to claim compensation in the civil courts for injury caused to him or his property because of it.*

As a result, "compensation" here is confined to a lack of access to information, implying the application of basic Civil Code provisions to other circumstances in which injury was caused to the usual contractor.

It would be ideal if the Iraqi government provided clear guidelines on when consumers are entitled to compensation for harm, rather than simply broad civil law standards. It would also be preferable if an explicit provision is put on the judgement that invalidates the agreements that free the supplier from the CPL's responsibilities.[260]

[259] Ajeel, "A Study in the Procedural Provisions of the Consumer Incidence Suit. A Comparative Study under the Consumer Protection Law No. 1 Of 2010."
[260] Kazim, "Study in the Procedural Provisions of the Action Consumption Incidents A Comparative Study Under Iraqi Consumer Protection Act No . 1 of 2010."

This research urges the Iraqi legislator to not restrict a consumer's right to request annulment with the possibility of seeking for compensation for the damage of one case, this violates the provider's duty to disclose information to that effect. While granted this right in other cases, such as discovering that the service does not meet the standard terms prescribed or the purpose for which it was contracted for.

In the author's viewpoint, it is very limited because it lacks any protection for the consumer of the personal loan. In fact, it deprives the borrower of basic international rights that protect his or her financial interest. In essence, the borrowers are not sufficiently protected from unfair provisions in their conventional form personal loan contract by these perplexing rights. Accordingly, the author suggests that borrowers be given special attention by the legislature.

The legislature also does not specify that the consumers have the right of involvement in the establishment of consumer protection associations, which will assist them in defending and claiming their rights on behalf of them. Thus, it is strongly recommended that the legislature include such right in the provisions of this law.[261]

The Iraqi legislation contains a section for supplier and advertiser requirements in the fourth chapter of the CPL. Unfortunately, the researcher was unable to find any passage that addressed the bank's obligations under the contractual method. The only provision is on the commodities it provides.[262]

[261] Ajeel, "A Study in the Procedural Provisions of the Consumer Incidence Suit. A Comparative Study under the Consumer Protection Law No. 1 Of 2010."
[262] Ibid.

The advertiser and the provider are both prohibited by the law from participating in lawful activities that involve fraud and deceit, but they are not punished for doing so.[263] This denotes that the choice was made in conformity with the Civil Code's fundamental principles. The ways in which this infringement is committed do not follow the Civil Code. Based on the assumption that fraud cancels everything, tighter accountability constraints are implied by the fraud. Iraqi law exclusively refers to deception one of the components of disinformation in the phraseology of Islamic jurisprudence, which is "deceiving." It is not thought that lying is a distinct fault of the will. As a result, the researcher suggests that the Iraqi legislator either keep the current legislation with the addition of a paragraph that includes special sanctions for such actions that are not covered by the general provisions or leave the treatment of fraud and deception to the general provisions of the Civil Law, specifically by deleting them from Article 9 (1).[264]

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Given the foregoing, this study advises that Iraqi legislation provide adequate consumer protection from service providers, especially those who want to take use of their financial situation to take advantage of customers, rather than leaving this issue to general standards. The goal is to provide better consumer protection. Regardless of whether they are commercial or civic (consumptive or non-consumptive), are governed by exploitation as a defect of will.

[263] Iman, Tariq, and Mansour Hatem. "Validation of the Defective Contract in the Iraqi Civil Law." *Journal of University of Babylon* 10, no. 6 (2005): 1055–67. https://www.iasj.net/iasj?func=fulltext&aId=66690.
[264] Salh, "A Critical Evaluation of the Legal and Sharia Aspects of the Iraqi Islamic Banking System, Using the Case Studies of Malaysia and Bahrain."

4.5 Consumer Issues with Unfairness in the Terms of Personal Loan Contract

In this section, the issues related to unfairness in the terms of personal contract are recorded from the interviews with consumers. In the data collection, since no rules are recognized by Iraqi law as being unfair, the researcher spoke with customers about the reality of unjust terms. The most accepted meaning of "unfair term" is as follows: "An unfair term that violates the duty of good faith significantly imbalances the parties' contractual rights and responsibilities to the detriment of the consumer."[265] However, many consumers are unaware that the loan's total interest rate is constantly rising. As long as the interest rate continues to rise and not decline, the sum increases. This happens due to the authorization (particularly the standard form loan contract) signed by the borrower to the bank without reading and understanding the terms and conditions.[266]

One of the justifications that led the Iraqi legislators to issue consumer protection laws was the lack of general rules in the Civil Code for Consumer Protection in a certain field. Unfair terms and conditions in consumer contracts are the most crucial issue that has to be addressed by the Iraqi consumer protection law, yet the issue has gone unaddressed by the legislators.[267]

The aforementioned conclusion indicated that the Consumer Protection Law in Iraq did not address consumer protection against unfair terms in consumer contracts generally or personal loan contracts specifically. It can be said that the terms are

[265]Competition and Market Authority, "Unfair Contract Terms Explained" (paper published online, UK, July 31, 2015).
[266]Mansour Hatem, "Change in Part of a Contract and Its Effect on Mutual Justice (Comparative Study)," *Journal of Babyl University for Humanitarian Sciences* 23, no. 4 (2015); Mansour Hatem, "Requirements of Fulfillment Contractual Fairness (Comparative Study)," *Journal of Babyl University for Humanitarian Sciences* 26, no. 3 (2018): 1–30.
[267]Khalil and Abdullah, "A Critical Reading of the Scope of Civil Protection in Iraqi Consumer Law: A Comparative Research."

arbitrary and deliberately designed by the professional against the weak party, the consumer in this case.[268]

R21 had the same view as R30's:

> *The increasing cost of living in Iraq had promoted more money borrowing activities between two major income groups namely; lower and middle-class society. It has become a necessity to impose new laws to safeguards or enhanced the real guarantees for the transactions and at the same time become a tool to protect consumers*".

The managing director of Credit (UBI), R16, stated:

> *The personal loans segment may be riskier and carries a higher interest rate, but it remains attractive to customers and banks alike. It represents an easy type of financing that requires minimum paperwork and high collateral or guarantors, personal loans have the potential for growth. Interest rates for personal loans are higher due to the higher risk lending model and can range between 5% for government servants and up to 15% for high-risk borrowers. The loan amount ranges from 5,000,000 to 15,000,000 Iraqi Dinar.*

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United Bank for Investment (UBI)'s chief executive officer, R17, said that the personal loans category continues to be one of the key growth drivers of the consumer banking industry even if individuals' ability to repay their debts is constrained in the present economic climate.

To confirm that, the head of the Al Rafidain Bank R14, noted:

> *Banks are keen to market this product as it offered quick growth potential on their receivables through the loan facility. Acknowledging that personal loans were normally two to three times riskier than business loans, the largest problem is finding a balance between price (in relation to interest rate setting) and client financing demands.*

[268]TahseenHamad, "The Negative Increase in the Provisions of the Iraqi Civil Code and Its Remedy Mechanisms" (paper presented in the Third International conference of IshiK university, Erbil; Iraq, May 10, 2018), https://www.ishik.edu.iq/conf/ilic/wp-content/uploads/2018/06/10.pdf.

He added:

> *Personal loans for government employees, meanwhile, would remain a focus for many banks as they were less affected by the economic slowdown, he added that personal loans only formed a small portion of banks' total loans although banks were aggressively pushing for market share within this consumer segment.*

A bank officer at AlRasheed Bank, R15, mentioned:

> *The personal loans are getting riskier with longer tenures amid the current economic climate and depend on the size of the loan as well as the credit assessment and underwriting of individual banks. They generally concur that banks have an internal credit assessment system to ensure that the risk of default is minimised. Banks normally have to look at an individual's cash-flow position as well as his ability to pay the loan.*

R2, the head of lawyers' association and consumer protection defender, emphasized:

> *The rise of personal financing reflected that more customers were in need of cash to meet their personal financial needs. We must look at the rising costs of living, costs of goods and services, costs of medical, education and others. We must then compare that to the low increment of wages over the years. Simply, the growth rate of household income has been lower than that of household expenditure over the last few decades. Hence, customers are left with no options but to take personal financing to meet non-recurring expenditure such as their parents' medical fees and hospitalization, children's education, house improvements and long-term retail investments.*

Personal loans are one of the primary retail products offered by the bank, according to the executive manager of the UBI, R17, in the interview. The products are in high demand at the bank, and the portfolio as a whole has been doing well. Consequently, the bank will keep providing personal loans to the market:

> *The personal loans provide an alternative to other personal financial management tools such as credit cards and overdraft facilities, which offer different platforms for customers to manage*

> *their spending and credit needs prudently, within their means of repayment, he said UBI aimed to achieve loan growth in all its existing products including personal financing. (R17)*

Accordingly, the Alsumaria News mentioned that the Rafidain Bank began since 2016 to grant advances and loans to employees. The offerings ranged between 5 and 10 million dinars according to certain mechanisms and conditions.[269]

Al Radidain Bank offered customers a loan of 15 million and 10000 dinars in the middle of 2017. The loan length did not exceed three years (short-term loans), was issued as a one-time payment, and was set at the borrower's discretion. "The interest rate on the loan of 15 million dinars is nine percent, the interest rate on the loan of ten thousand dinars is seven percent, and the bail bond for one government employee is one percent." the branch's director added.[270]

Al-Rasheed Bank has said that wage settlement was a requirement for the issuance of loans and advances to employees in 2018. The bank is "granting modest advances and loans to settle salaries," according to a statement received by Alsumaria News, and is requesting that all ministries and government organizations "review branches in Baghdad and the provinces to sign a contract for resettlement.[271]

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[269] Alsumaria, "New Statement of Rafidain On Granting Advances and Loans," Alsumaria News, October 17, 2018, https://www.alsumaria.tv/news/250201/%D8%A8%D9%8A%D8%A7%D9%86-%D8%AC%D8%AF%D9%8A%D8%AF-%D9%84%D9%84%D8%B1%D8%A7%D9%81%D8%AF%D9%8A%D9%86-%D8%A8%D8%B4%D8%A3%D9%86-%D9%85%D9%86%D8%AD-%D8%A7%D9%84%D8%B3%D9%84%D9%81-%D9%88%D8%A7%D9%84%.

[270] Alsumaria, "Rafidain Issues Instructions and Terms of Loans of 15 Million Dinars," Alsumaria News, June 10, 2017, https://www.alsumaria.tv/news/206569/%D8%A7%D9%84%D8%B1%D8%A7%D9%81%D8%AF%D9%8A%D9%86-%D9%8A%D8%B5%D8%AF%D8%B1-%D8%AA%D8%B9%D9%84%D9%8A%D9%85%D8%A7%D8%AA-%D9%88%D8%B4%D8%B1%D9%88%D8%B7-%D9%82%D8%B1%D9%88%D8%B6-%D8%A7%D9%84%D9%8015.

[271] Alsumaria, "Al-rasheed: Granting Advances to Employees Depends On the Speed in Settling Salaries," Alsumaria News, February 27, 2018, https://www.alsumaria.tv/news/230520/%D8%A7%D9%84%D8%B1%D8%B4%D9%8A%D8%AF-%D9%85%D9%86%D8%AD-%D8%B3%D9%84%D9%81-%D8%A7%D9%84%D9%85%D9%88%D8%B8%D9%81%D9%8A%D9%86-%D9%85%D8%AA%D9%88%D9%82%D9%81-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D8%B3%.

According to the bank, pay settlement "will enhance the employee's receipt of his salary through the card (MasterCard Palm), which simplifies the parties' process of granting advances and loans," the bank claims. Salary settlement is the procedure of transferring salaries of employees in the public or private sector from manual salaries received from their departments to receipts from public or private banks through a special account opened for the employee in the bank and withdrawals by electronic payment card or cash received from the bank.[272]

Hamid explained:

> *Domestic banks are required to raise funds through borrowing to face higher borrowing costs, as a result, they increase their lending interest rates. As the lending rates go up, banks, on average, attract a riskier pool of consumers that require higher returns on repayment. Higher interest rates also force banks to take into account possible monitoring costs; they set lending rates primarily on the basis of their cost of deposit rates and the cost of inter-bank borrowing[273] "*

It could be seen that every bank takes different procedures to grant loan without mentioning about a unified legal rules and regulations. According to Aamal Al-Shawaily, senior official at Al Rasheed Bank, each bank has a unique set of rules and laws that suit its operations and objectives.[274]

A member of parliament (MP), Jamal Al-Muhammadawi, called for the elimination of discriminatory interest rates on loans and advances given by government banks to

[272]Alsumaria, "Al-rasheed: Granting Advances to Employees Depends On the Speed in Settling Salaries," Alsumaria News, February 27, 2018, https://www.alsumaria.tv/news/230520/%D8%A7%D9%84%D8%B1%D8%B4%D9%8A%D8%AF-%D9%85%D9%86%D8%AD-%D8%B3%D9%84%D9%81-%D8%A7%D9%84%D9%85%D9%88%D8%B8%D9%81%D9%8A%D9%86-%D9%85%D8%AA%D9%88%D9%82%D9%81-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D8%B3%.

[273]Hamid Rashid, "Credit to Private Sector, Interest Spread and Volatility in Credit-Flows: Do Bank Ownership and Deposits Matter?," *United Nations Department of Economic and Social Affairs* (New York, 2011), http://www.un.org/en/development/desa/.

[274]"Loans and Advances of Rafidain and Rasheed Banks and Conditions for Obtaining Them."

workers in October 2018. Al-Mahmoudawi said in a statement acquired by Alsumaria News:[275]

> *We strongly reject the imposition of a high rate of interest on loans and advances of employees and in a cumulative way to multiply the benefits of borrowers; so that for the value of the total interest rate of the personal loan of Ten Million to Four Million Five Hundred Thousand Dinars - the value of the interest rate increases as the loan amount received by the employee increases.*

Al-Mahmouddawi added:

> *These high cumulative interest rates reflect an unfair policy to borrowers (employees), thus requires immediate review and change, which raises that unfairness and eliminates the severe damage to the citizen in need of those loans. And those affected should follow the methods and legal mechanisms to protest and object to these unfair decisions and correct those decisions, which raises that obvious damage.*

It is crucial to remember that Rafidain and Rashid Banks provide workers and borrowers loans and advances with interest rates ranging from 7-9% for amounts between 5 and 10 million dinars, which weighs the consumer and extends the number of years before the complete repayment of these sums is made.[276]

R18, a customer disclosed the loan amount he obtained from Bank Al Rafidain:

> *For the 10 million Iraqi Dinars personal loan, I received just 7 million, the rest is for the bank officers to ease the loan procedures and interest rate and other fees. I paid more than a quarter of the loan and I do not understand why and where it goes. They offered the loan like this; if I want to take, I must accept, otherwise, I am not qualified to take it. Is this fair? As a consumer, it is very unjust*

[275] Alsumaria, "A Parliament Member Talks About the Interest Rates of Loans and Advances Received from Government Banks," Alsumaria News, October 14, 2018, https://www.alsumaria.tv/news/249947/%D9%86%D8%A7%D8%A6%D8%A8-%D9%8A%D8%AA%D8%AD%D8%AF%D8%AB-%D8%B9%D9%86-%D9%81%D9%88%D8%A7%D8%A6%D8%AF-%D8%A7%D9%84%D9%82%D8%B1%D9%88%D8%B6-%D9%88%D8%B3%D9%84%D9%81-%D8%A7%D9%84%D9%85%D9%88%D8%B8%.

[276] Alsumaria, "A Parliament Member Talks About the Interest Rates of Loans and Advances Received from Government Banks," Alsumaria News, October 14, 2018, https://www.alsumaria.tv/news/249947/%D9%86%D8%A7%D8%A6%D8%A8-%D9%8A%D8%AA%D8%AD%D8%AF%D8%AB-%D8%B9%D9%86-%D9%81%D9%88%D8%A7%D8%A6%D8%AF-%D8%A7%D9%84%D9%82%D8%B1%D9%88%D8%B6-%D9%88%D8%B3%D9%84%D9%81-%D8%A7%D9%84%D9%85%D9%88%D8%B8%.

> *and there is no specific authorised legal framework to supervise and deal with these unequal practices by banks.*

Another consumer, R19 reported:

> *The banks always deduct from the original loan sum firstly, before taking the loan they deduct the interest rate that equivalent to more than quarter the sum, then they deduct the bank's entire procedure fees of granting loans. After that, the final sum is not the exact sum that we demand, it became a small amount. At the end of the period, I found myself paid 48 million for 30 million which is the original loan sum, the18 million profits is too much for consumers.*

When he was asked for the reason that forced him to take the loan with such terms and conditions, R19 noted:

> *I know that the process of taking the loan and the terms, and the terms are unfair, but I was forced to take it because I need to go outside the country for a medical case. I blame our laws and institutions which neglect such issues that affected most of the people's financial interests.*

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As a result, standard loan agreements take the form of written contracts that include all of the terms and conditions of the loan services agreement. A supply contract exemplifies this arrangement, with huge corporate entities (banks) supplying loan services on one side and consumers (borrowers) on the other. Individual consumers frequently have little bargaining leverage in this form of arrangement. Additionally, the courts have not intervened to protect the weaker party against unreasonable and unjust terms, particularly those that free the stronger party from his obligations. The bank officials examined (R14, R15, R16, and R17) agreed with the R7's assessment of standardized loan contracts and also stated that "Their standard form contracts represent both the expected and emerging trends in this industry."

Standard form contracts are extensively used throughout Iraq and are the most cost-effective alternative for conducting business. Parties can avoid the transaction expenses associated with a negotiated contract by using the contracts. Customers of personal loan contracts typically get standard form personal loan contracts on a "take it or leave it" basis because they lack the knowledge or resources to fully understand the implications of contract clauses. If one of the parties does not have the chance to negotiate or modify the contract's terms before agreeing to it, the agreement is said to be in standard form. The personal loan contract is an illustration of the usage of standard form contracts, as the previous explanation demonstrates. In the next paragraph, the actual and common unfairness of personal loan contact will be discussed.

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4.5.1 Procedural Unfairness leads to Unfair Contractual Terms

Unfairness in a contract may occur during or as result of the bargaining process. When the negotiation process is defective, this is known as procedural unfairness. The consequences of a transaction may also be unfair (due to unjust contract provisions or severely insufficient consideration), which is known as substantive or contractual unfairness.[277] A bargaining position might be unequal owing to the stronger party's excessive strength (strength-based inequality) or the weaker party's significant weakness (weakness-based inequality), [278]resulting in the real view of how banks interact with borrowers.

An interview with a consumer (R20) was recorded as follows:

[277] Adnan Trakic, "The Inequality of Bargaining Power: Does Malaysia Need This Doctrine?," *Australian Journal of Asian Law* 17, no. 1 (2016): 1–19.

I went to a bank to take up a personal loan directly after I saw their advertisement. An officer told me if I applied for a personal loan, I should just bring my required personal documents and the rest procedures we will manage to give you the sum. He briefed me on the main points (loan amount, repayment method and instalments and duration of the loan).

But he did not tell me the rest of the contract's terms and detailed explanation, for example, the penalty for delay repayment of loan instalment. Then, during the loan period, unexpected security situation prevented me from going to the bank and pay the instalment. After that, my guarantor called me and told me that the bank deducted from her salary the delayed instalment plus penalty fees without notifying me or notifying the guarantor before the deduction.

Respondent R20 added:

Poor loan arrangement and lack of information had caused us a problem by paying a double amount of the loan to the bank and also repaying debt to my guarantor; in addition, there is also my urgent need for the loan; I equally acted in ignorance of basic procedures and the absence of consumer protection from unfairness in the personal loan contract. We call the legislature to give more attention to the consumer personal loan legal rights management to protect their financial interests. This is the minimum duty of the government to protect its citizens.

Another consumer, R26, offered the following perspective:

The disturbing trend of banks enticing consumers to take up personal loans should be stopped before more consumers fall into the debt trap. Recently, banks offering a variety of personal loans of different sums. These offers are attracting many needy people to borrow loans from banks. The loans may be hassle free but it is definitely not cheap. With different interest rates per period, but it costs the debtor double charges of their personal loan, the borrower would have paid double the amount borrowed and it is considered high.

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The Central Bank has to discourage banks from luring individuals into debt, a member of the consumer protection group R1 cautioned. In order for Iraq to become a country of borrowers, the bank must ensure that all banks behave responsibly, and that Iraq will be forced to pay via unfavourable social and economic impacts.

The banks depend on the interest rates to gain profits without paying attention to the vulnerable consumers who are suffering from inflationary pressure and financial life difficulties. The bank always designs procedures that pour into their financial interests. Since this term is already accepted and signed by the consumer through the standard form loan contract from the early beginning of the contracting procedure, banks have been adjusting their customers' interest rates frequently without providing them with prior notice. Their argument is that they have been complying with the Central Bank's regulations and recommendations.[278]

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The head of the CBI said in an official interview that at the end of 2015, the CBI instructed the banks via a proclamation to disclose and share the loans data with it so as to ensure the activation of the transparency and supervision upon all loans.[279]

While in the following year also in an official interview, the head of the CBI claimed that the banks do not comply with the CBI rules and regulations regarding the loans.

[278] Yuk-shee Chan and George Kanatas, "Asymmetric Valuations and the Role of Collateral in Loan Agreements," *Journal of Money , Credit and Banking* 17, no. 1 (2017): 84–95.
[279] Alsumaria, "CBI Requires Banks to Publish Loan Data to Achieve Transparency," Alsumaria News, September 11, 2015, https://www.alsumaria.tv/news/145942/%D8%A7%D9%84%D9%85%D8%B1%D9%83%D8%B2%D9%8A-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A-%D9%8A%D9%84%D8%B2%D9%85-%D8%A7%D9%84%D9%85%D8%B5%D8%A7%D8%B1%D9%81-%D8%A8%D9%86%D8%B4%D8%B1-%D8%A8%D9%8A%D.

Ali Alallaq criticized the performance of the government banks in dealing with personal and business loans.[280] He said:

> *We have expressed our opinion of the need to review the management of government banks; there is a delay in the performance of these banks in spite of the role assigned to the present time, which is important and essential.*

He added:

> *The management of these banks must be efficient to build an economic base of the country," noting that "the experience of loans that were launched by the Central Bank did not find any interaction by these banks, what was left to the bank is to follow up these loans, although these loans are made across these banks.*

He also gave his view as follows:

> *The Central Bank informed the government that there should be real management of these banks, "pointing out that "the administrations of these banks used a particular pattern of work and limited possibilities, which is above the absorption, although this varies from bank to bank.*

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The governor of the CBI, Ali Alallaq, revealed at November 22, 2015, about the "acquisition" by Rafidain Bank and Rashid of about 80% of the assets of the banking sector in Iraq, while noting that the banks were suffering from several problems. He explained that the CBI was moving towards privatizing the banks.[281]

[280] Alsumaria, "Central Bank: The Official Banks Did Not Cooperate with Us About Loans," Alsumaria News, January 13, 2016, https://www.alsumaria.tv/news/156891/%D8%A7%D9%84%D8%A8%D9%86%D9%83-%D8%A7%D9%84%D9%85%D8%B1%D9%83%D8%B2%D9%8A-%D8%A7%D9%84%D9%85%D8%B5%D8%A7%D8%B1%D9%81-%D8%A7%D9%84%D8%AD%D9%83%D9%88%D9%85%D9%8A%D8%A9-%D9%84%D9%85-%D8%AA%D8%AA%D.

[281] Alsumaria, "Central Bank: The Official Banks Did Not Cooperate with Us About Loans," Alsumaria News, January 13, 2016, https://www.alsumaria.tv/news/156891/%D8%A7%D9%84%D8%A8%D9%86%D9%83-%D8%A7%D9%84%D9%85%D8%B1%D9%83%D8%B2%D9%8A-%D8%A7%D9%84%D9%85%D8%B5%D8%A7%D8%B1%D9%81-%D8%A7%D9%84%D8%AD%D9%83%D9%88%D9%85%D9%8A%D8%A9-%D9%84%D9%85-%D8%AA%D8%AA%D.

According to a recent IMF 2019 study, there is state domination and inefficiencies in the banking sector in the Iraqi economy. The two biggest banks, Rafidain and Rasheed (R&R), which combined own around 71 percent of bank deposits (against the 86 percent held by the seven state-owned banks) and extend 54 percent of credit (versus the 80 percent provided by the seven state-owned banks), are a good example of this situation. Recent accounts that have been audited in accordance with international norms are deficient and most likely grossly undercapitalized. State-owned banks, which make up the majority of the banking industry, have a lack of capital, and their lending portfolio continues to have flaws. In both public and private sector banks, the percentage of nonperforming loans is large and rising. Private Banks don't offer as much loan since profiting on the difference between the official and alternative exchange rates is far more lucrative. Iraq's financial industry is therefore seen as being weak.[282]

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Bank officers R14 mentioned in the research interview:

> *The bank issue an interest rate depending on the sum of the personal loan and the length of the contract. Bank set the interest rate based on the marketplace currency rate and the demand and offer. It serves the bank interest because it secures the loan against loss of any non-repayment from the consumer side.*

R16 expressed the same information, and R15 added and confirmed the statement:

> *The interest rate is the powerful tool to gain profits from providing and granting loan service. We have the right to set our interest rate because the CBI recently does not specify the interest rate. Our bank deducts the interest rate in advance from the total amount of the personal loan contract associated with processes fees of issuing the loan". All these deductions are standard and not stated in the standard form contract that*

[282] Gazi Shbaikat, Salim Dehmej, and Amgad Hegazy, "Selected Issues," *International Monetary Fund .Publication Service* (Washington, 2019), https://doi.org/10.1007/978-1-4684-3821-5_16.

> *prepared to be signed by the borrower. It is subject to the followed standards of the bank rules, terms and conditions of the loan contract.*

The sheer act of making a loan based on a high interest rate reveals that the lender solely cares about enriching the bank, and that this advantage must always be covered by the borrower. The case becomes much more compelling when the borrower is a person who need the loan to handle an unexpected catastrophe or emergency. The borrower is at his most vulnerable financially under this circumstance. Without any choice, he is in an unfair situation.[283]

A consumer, R21, stated:

> *I am an employee at the government; my salary is not enough to cover the urgent and emergency financial needs. I take the personal loan to register my children in a private school. My loan was 5,000,000 Dinar, I received just 4,750,000, and I repaid 7,400,000. The interest rate is quite high. And the bank did not inform me the percentage of the rate they just inform me this is the process if you are interested to take the loan, since I do not understand the rules and terms in the loan contract.*

Another consumer, R24, added,

> *I got a personal loan of 50000000 Iraqi Dinar and the bank officer said that the repaid sum will be 75000000 Iraqi Dinar. I do not know how much they charge for the annual interest rate. It is unfair; because we need the money, they charge us a high-interest rate without care about our capability. I, as a consumer, I request the government to look seriously for our financial protection. It is a burden on our lives.*

While, R23, who is an employee, summarized his case:

[283] Aboalqor Rafiqa, "Commitment to Inform Customer in the Realm of Bank Loans," *Legal and Political Journal*, no. 12 (2018): 11–24.

> *We as employees are required to sign a bunch of papers without knowing what these papers include. In addition, the bank does not give us a copy of these signed documents. A new requirement of promissory (Bill of Exchange) payable to the bank in addition to the guarantor means that the bank may take the repayment at any time it like, contrary to what was stated, that is borrower repays in specified time by instalment. The sum set in the promissory is remaining fixed even after the borrower repays monthly instalment as a part of the loan. We are worried about this risky bond. Furthermore, when we repay the instalment, we do not take any receipt to prove that, or any other document to specify the repayment sum, date, and remaining sum. We notify others to be careful and not to be rushed under any situation or in need without consulting experts and should be mindful about the result in the future.*

Similar to the experience of R23, both R25 and R27 mentioned that they suffered from the issues mentioned above. A consumer of a public bank, R18, reported:

> *The process of taking the personal loan is lengthy and complex thing, in addition they require many documents. They do not give the loan one time but as a pay. We call the authorities to interfere to organise this burden by government banks.*

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In addition, R19, R20, and R21 asserted that the bank procedures should be considered. As consumers of a private bank, R23, R24, and R26 reported that the process is acceptable, but the banks require borrowers to provide strong collateral to secure the personal loan contract. Applying for a loan is "easy" to a certain extent but the consumer has to adhere to the strict requirements.

The study concluded that the borrower-lender relationship is never fair given the above criteria since only one side bears the risk and the other receives a set return. No matter what happens to the borrowed funds, the lender has no right to demand a

certain return on the main loan. It is unjust to require the borrower pay a high interest rate.

The above notion can be confirmed by the field interviews in the present study. R11, a judge in the civil court, reported a case law about the standard form personal loan contract between a bank and a borrower. The agreement covered every detail, clause, and condition of the personal loan agreement signed by the borrower and the bank. The defendant served as the borrower's surety against the bank, and neither the interest rate nor the bank's fees were disclosed. This means that the bank has free power to specify the interest rate in those fields. Eventually, the situation would pose great harm to the borrower in the future because the borrower blindly signed the contract. Interestingly, in the case report, the judge did not pay attention to the empty interest rate and the banks fees, which were left empty by the bank. In this instance, the bank has the authority to modify the fees in accordance with its policies.

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From research's point of view, a society that includes institutions like banks, who possess dominant traits will inevitably create a situation in which the majority of people not only oppose their social objectives but also have different interests. In a society, a class of individuals will amass the majority of the money, with the remaining riches going to the other members of the population. As a result, a lack of mutual trust between the government and population will weaken communal togetherness. Consequently, it upsets the equilibrium of the society, making it a highly unstable one.[284]

[284] Khalid Attchan, "The Bank's Civil Liability for Consumer Loan Operations Towards the borrower. Studying Kuwaiti and French Law," *University of Kuwait* 26, no. 49 (2012), http://iefpedia.com/arab/wp-content/uploads/2017/01/.

In order to achieve the balance of counter values or the equality between parties, the law should thus make an effort to eradicate the components of inequality and injustice from personal loan arrangements. Another issue with the loan is its inequity, which leaves the borrower too much in the lender's hands. The balance of counter values is therefore never preserved. In other words, the borrower is too frail to be properly compensated for their work. Even if all sides in this case come to an agreement, there will never be a true agreement.[285] Scholars and legal experts have called for the limitation of the interest rate in advance and not to leave it to the bank management to decide and alter the related term[286]. Further, the restriction of banks' wide power should be ensured so as to protect the consumers against high-interest rates.[287]

In light of this, the law academic lecturers R6 mentioned that,

> *To limit the wide and unlimited power of the bank, the CBI should force the annual interest rate into the banks in issuing the personal loan contract terms and should supervise the banks by a specialized audit committee who will be visiting the banks to check.*

And R7 confirmed the previous opinion. R4 which is a member of the consumer protection organization said,

> *To avoid such issue, the banks should be required to post the offers of the personal loan and all related fees on the audience in advance through media to be clear and to eliminate the unfair practice by the banks regarding the interest rate in the personal loan standard form contract.*

[285] Hideyuki Shimizu, "Philosophy of the Islamic Law of Contract a Comparative Study of Contractual Justice" (iMES Working Papers Series No.15, Japan, 2012), http://nirr.lib.niigata-u.ac.jp/bitstream/10623/38149/1/2012_1_iuj1_9.pdf.
[286] Kareem, "The Impact of Banks Specialized in Finance and Investment (Real Estate Bank Case Study in Muthanna Province for the Period 2002 - 2017)."
[287] Adnan Boshan, "The Banking Sector Is a Vital Position of Economic Systems," Al Kanounia, accessed August 12, 2018, http://www.alkanounia.com/-%D8%A3%D9%8A%D8%A9-%D8%AD%D9%85%D8%A7%D9%8A%D8%A9-%D9%84%D9%84%D9%85%D8%B3%D8%AA%D9%87%D9%84%D9%83-%D9%81%D9%8A-%D8%A5%D8%B7%D8%A7%D8%B1-%D8%A7%D9%84%D8%AE%D8%AF%D9%85%D8%A7%D8%AA-%D8%A7%D9%84%D8%A8%D9%8.

Furthermore, the process of granting personal loans is an important and necessary process for individuals and economic activity in general. The granting of these loans should be subject to the feasibility study of granting it because of its positive effects on both parties. The bank guarantees that its loan will be paid to it with all the other obligations. As for the consumer of the loan, the obligations imposed on him/her will be equal to the minimum of his/her financial ability, if he/she cannot bear more than his/her ability in terms of duration and the amount of loan to be fulfilled to the bank.[288]

As seen through the media, there is pressure by the banks to grant personal loans to the public so as to attract them to borrow. In particular, the banks offer specific discounts and facilitation of procedure. After the borrower gets the personal loan, over a period of time, he or she would find himself/herself paying more than the value of the personal loan. Then, he or she would try to escape from the obligations, thereby falling on the guarantors.

As mentioned by R10,

> *It happened in case law, his guarantor was subjected to a deduction from his salary for three years without warning by the bank and when he claimed at the court his request was rejected, because he exceeded the period of time to claim the deduction, and from the court point of view, it justified its judgement by saying that the plaintiff was satisfied over that period on deducting his salary.*

R22 confirmed the above incident, noting it to be somewhat similar to her case:

> *It was very easy to get the personal loan. The bank officer asked for the required documents and signed a ready contract. Then*

[288]Brown, "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law."

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> *my sister had guaranteed me on personal loan, and after a period, we could not repay the instalment for a month. We were surprised by my sister's call; she said that the bank cut off the instalment from her salary without prior warning and we did not know that the bank has the right in the loan contract to deduct without warning.*

The process of granting loans is a significant and vital process for individuals and economic activity in general. However, granting these loans randomly has negative effects on both sides. Especially on the borrower and others such as guarantor, and the borrower may be burdened with financial burdens exceeding his financial ability to pay. That may result in exhaustion or default in repaying the loan amount, especially if the value of the loan is not commensurate with his financial situation and the long repayment period.[289]

Lending of this type makes the others (guarantor) a victim because often believe in the ease and ability of the borrower to meet the loan amount. To avoid this, the loan should be granted on the basis of the borrower's financial condition. The borrower should not be burdened with financial burdens beyond his or her financial capacity. Otherwise, the civil responsibility of the bank will be raised.

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4.6 Conclusion

Iraqi residents have a lot of mistrust for the country's financial institutions because of the shaky past of the country's banking sector. There are frequently reports of scandals, kickbacks, and corruption in both state-owned and private banks. The management of private banks has proven to be exceedingly challenging due to the

[289] Khalid Attchan, "The Bank's Civil Liability for Consumer Loan Operations Towards the borrower. Studying Kuwaiti and French Law," *University of Kuwait* 26, no. 49 (2012), http://iefpedia.com/arab/wp-content/uploads/2017/01/.

unstable political climate, corruption, and flimsy security. In recent years, private banks have been implicated in several scandals. The scandals have eventually harmed the banking industry's reputation as a whole.

As a summary, it could be clearly seen that although the above-mentioned consumer issues emerged from the prominence of the banks in setting the standard form personal loan contract, the Iraqi legislature lacks a thorough statute that protects customers from their dilemma. Iraq has a basic consumer protection statute from 2010 (Consumer Protection statute), however it makes no specific mention of financial services. Additionally, the ICC 1951 primarily focuses on regulating the fundamental rules of contracts between reasonable parties. Personal loan borrowers in Iraq are lamenting their lack of negotiating power and suffering as a result of the injustice in the standard form contract, which put them in a precarious situation.

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However, the provisions of those laws, which are frequently referred to as consumer protection laws, did not specifically address the fundamental rights enjoyed by the consumer of the standard form loan contract on the other and did not achieve the desired protection of inaccuracies on the one hand.

Two important regulatory mechanisms that regulate banking and financial institutions in Iraq are the banking law and the Central Bank of Iraq (these will be discussed in Chapter Six). Nevertheless, these regulatory mechanisms generally do not protect credit consumers (loan borrowers). For credit consumers, terms such as interest rate on loan are specified by the ICC 1951 at 7% and previously by the CBI

regulations. Other terms and conditions imposed or bonded both parties are normally spelt out via a personal loan agreement that has been agreed by both parties.

From the aforementioned, the researcher could only draw the conclusion that in a personal loan contract, the weak party (the borrower) is obligated based on the criteria set out by the strong party (the bank) without debate because of his or her urgent need for a loan service. Like any other contract, the agreement is concluded between two parties; one of them is the offeror and the other is the acceptor. The offer, however, is made to everyone and is enforceable against the acceptor even if that person did not read the terms of the agreement as long as they are visible to them. The acceptance is characterized by being submissive to the willingness of the bank.

Thus, if the normal contract is to be concluded between two parties at one legal status and based on two free wills in the choice of what is to be concluded and are inconsistent with all the terms and conditions listed in the contract; however, circumstances may force people to enter into a certain type of contract without the freedom of choice. In other words, the coercion parties are not in one position. One of the parties accepts the contract by complying with the conditions dictated by the offeror. In this way, the consumer has issued his or her consent to the contract and its terms without discussion to negotiate on them, because he or she needs to get something that cannot be dispensed with. Therefore, he or she can only accept or refuse, then the satisfaction exists but is suspected of being somewhat coercion.

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CHAPTER FIVE
CONSUMER PROTECTION MEASURES AGAINST UNFAIR TERMS IN A PERSONAL LOAN CONTRACT WITH A BANK: THE UK LAWS

5.1 Introduction

In order to address the challenges of managing consumer protection from unfair terms in a personal loan contract, this chapter presents a thorough analysis of the institutional and legal framework of a foreign legal system, in this example, the United Kingdom's (UK).The review helps the researcher better grasp the financial and legal framework that is utilised to safeguard the weaker party in the contracting process of a loan contract, as well as all the connected measures that shield a weaker party from unfair terms. This chapter also discusses the benefits, uses, and advancements of safeguarding customers against unfair terms in a typical loan contract with a financial institution (in this example, a bank). The essence of the review is to describe an exemplary benchmark for the development of the Iraqi legal framework. The procedure comprises a review of the principles and regulations for UK law's consumer protection against unfair terms in a loan contract.

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5.2 The Origins of Consumer Protection Justification for a Bank Consumer Contract (Standard Form)

As noted by Edward:

> *The archetypal contract in American law is the "bargain" transaction, a relationship among two or more parties who agree to exchange acts or promises. That which either participant gives or promises to give in the future is the consideration normally prerequisite to enforcement of the promise he has received "*[290]

[290]Edward Dauer, "Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction," *Akron Law Review* 5, no.1 (1972), https://www.uakron.edu/dotAsset/a8870367-6b05-4822-8c95-262d3b913657.pdf.

Because even a simple transaction might be viewed as a legal act, the aforementioned definition does not indicate the characteristics of a legitimate negotiation or even a compromise. The law of contracts, on the other hand, is seen as a consensual-based system that justifies the use of a legal tool to compel the fulfilment of negotiated commitments. This characteristic also suggests the necessity for a broader definition of such a deal. The process must be one in which the benefits and disadvantages of the parties can be respectively adjusted to reflect a mutual level of agreement.

Although a bargain is enforceable legally, in an instance when it fails to adhere to such expanded notion. The clause must be included into the entire legal procedure under the presumption that by simply mandating the presence of an exchange relationship, the "adjustment" will inevitably take place.The underlying presumption of this theory is that, despite the existence of a true process of mutual agreement, one party is always regarded to be at fault in some manner.[291]

Edward added,

> *As true as this premise may have once been, the bargain model no longer accurately captures the vast majority of transactions that the legislative and judiciary currently consider as "contracts" (apart from in a very formulaic sense). Once it is acknowledged that the standard form contract serves as the most common record of consumer-level transactions rather than a departure from some assumed norm, it is perfectly pertinent to pose the following two questions: First, when a Standard Form is provided in an adhesive circumstance, may the contractual method be considered a good "bargain"? If not, is it sufficiently different to call into question the reasoning behind everything that results from postulating the bargain model?*[292]

[291]Ibid.
[292]Ibid.

In today's imperfectly competitive market, using standard form contracts for consumer products and services mostly breaches the larger, consensual definition of a deal. The extent of the adoption has reached the level at which the party involved does not have a clear picture of the sacrifice being made or the benefit to be gained, thus making it difficult for him/her to establish his/her level assent to the exchange. The law makes an effort to cope with the standard form contract using the principles derived from its unresponsive actuality since a customer is unlikely to distinguish between it and the bargain model, which is statistically more typical. The main difficulty could therefore be an unrealistic assent to the contract.[293]

Generally speaking, the standard form lacks two characteristics that make it genuine: (a) It's formatted to be a written document and (b) Its use is mostly related to circumstances that are close to monopolies. Following the standard form's consequential postulation of a "bargain," the legal opinions on the two aspects in question run counter to both the fundamental concept of a contract and the political presumptions on which it is based.[294]

In conclusion, if a contract is thought of as a system that deals with consensual duties, it is important to determine if a deal is necessary and desirable. However, under current legislation, it is difficult to show the existence of the operational facts of that "bargain" even in the required form. At most, the standard form falls far short in guaranteeing the presence of an actual agreement for an exchange. Such a gap has

[293] Barnhizer, "Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract-Symposium Introduction"; Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power."
[294] Abdul Razzaq Al-Sanhouri, *Mediator in the Explanation of the Civil Code: Sources of Obligation*, 1st ed. (Eygpt: House of Egypt Rise for Printing, Publishing & Distribution, 1952), https://www.goodreads.com/book/show/34112526.

brought about the adhesive form contract, which abrogates the requisite knowledge and choice to real assent.[295]

The genesis of the agreement is the complete and total freedom that the parties experienced during the contracting procedure based on the idea of will autonomy. Regarding the idea of a contract's "binding force," this principle also includes the parties' promise to carry out the contract's duties in accordance with what has been agreed.[296]

Previously, hardline individualist attorneys defended unrestricted contract freedom on the grounds that people are intelligent, educated, and capable of preserving their own interests. These persons should be free and independent in their contractual arrangements, with the ability to enter into whatever contract they like.[297] Judges or legislators might defend them; they have rights and capacities, and hence society should assist them.[298]

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They will win the game if they make a good deal; if they create a terrible contract, they will have to pay a price for freedom. Individuals must be respected for their decisions, and so managing their contractual relationships might be viewed as weakening their competence.[299] Individualists have so argued that the cost of constraining contractual liberty may be higher than its benefit in order to support

[295] Albert Choi and George Triantis, "The Effect of Bargaining Power on Contract Design," *Law Review* 98, no. 8 (2012): 1665–1743.
[296] Nicholas Wilson, "Freedom of Contract and Adhesion Contracts," *Cambridge University Press* 14, no. 1 (1965): 172–93.
[297] Andrew Burgess, "Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion," *Anglo-American Law Review* 15, no. 4 (1986): 255–80, https://doi.org/10.1177/147377958601500402.
298 Mulcahy, Linda. Contract Law in Perspective. 5th ed. Routledge-Cavendish, 2008.
[299] In Brower v. Gateway 2000, Inc., the court rejected an adhesion contract defense to enforcement of an ICC arbitration clause under the duty-to-read rule despite uncontested evidence that the elements that the court found made the clause substantively unconscionable, the loser-pays-expenses rule and the $2,000 non- refundable fee, were not disclosed in the contract. As plaintiff's counsel discovered, the only way to obtain the ICC rules containing this information was by contacting the U.S. Council for International Business. Id. So the duty to read rule binds the consumer to terms he could not possibly have understood by reading the contract.

total and unrestricted contractual liberty. Controlling interest rates in loan contracts, for example, has resulted in the formation of an unlawful black market.[300]

Individualists' beliefs at the beginning of the nineteenth century led to the assumption that "national spirit" was the true source of contract law and so should be shielded from the influence of public law.[301]. Their arguments were largely seen as excessively broad and so unsatisfactory. Individual contractual regimes were subject to a large level of unavoidable societal oversight; for example, Emilia claimed that "courts have long refused to enforce most illegal contracts or those against public policy." A contract involving the conduct of a crime or a pact to commit a crime could not be enforced by the law.[302]

Individualists' views on unrestricted freedom of contract were also regarded unworkable since their vision was based on historical remnants. To support the principle of unconstrained contractual liberty, the argument that people's choices should be honoured was studied exhaustively.[303] When the negotiating power of the contracting parties is drastically imbalanced, the weaker party's decision may not be genuine. How far may the law go to enforce an unequal contract in which the option of the weaker party is mostly ineffective?[304] According to Raz, people' complete

[300] Kessler, Friedrich. "Contracts of Adhesion--Some Thoughts about Freedom of Contract." *Columbia Law Review* 43, no. 5 (1943): 629. https://doi.org/10.2307/1117230.
[301] Dauer, Edward. "Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction,." *Akron Law Review* 5, no. 1 (1972). https://www.uakron.edu/dotAsset/a8870367-6b05-4822-8c95-262d3b913657.pdf.
[302] Mihai, Emilia. "General Law Notions Involved in the Regulation of Unfair Terms." *Curentul Juridic* 2010, no. 193 (n.d.).
[303] The classical contract theory states that the parties are at liberty when concluding their contracts and whatever is agreed that subsequently ought to be fulfilled and if necessary enforced by the courts. Courts are not to interfere and rewrite the contract for the parties. The common-law courts have traditionally been very fond of this doctrine, as can be seen from the wordings of Sir George Jessel MR in Printing and Numerical Registering Co v Sampson: if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.
[304] Dauer, Edward. "Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction,." *Akron Law Review* 5, no. 1 (1972). https://www.uakron.edu/dotAsset/a8870367-6b05-4822-8c95-262d3b913657.pdf.

autonomy will be a negative since it would be used to create bad and ineffective consequences.[305]

Two justifications promoted law intervention in individuals' contractual relations:

(1) *The need to protect revenue and public interest*. The law expressly or implicitly forbids the establishment or fulfilment of contracts that are inconsistent with the moral or social norms of the society[306]. In a contemporary economy with complex contractual relationships, the law intervenes to safeguard the public interest by approving some statutory requirements, such as licencing, as conditions for contract validity.

(2) *The need for the law to exercise its controls for the protection of the weaker contracting party against unfair terms*. This was accomplished by allowing them to terminate the contract whole or partially, or by refusing to enforce outrageous terms.[307]

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However, the freedom of contracting in many contracts has been lost as a result of the development of its formulas and the strengthening of induvial' consumption tendency. Also, presence are the effects of industrial and technological developments at all levels and in various fields. These developments have had a clear impact on consumers' position as the weak party in an economic equation due to their lack of

[305] Raz, Joseph. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford University Press, 2009. https://doi.org/10.1093/acprof:oso/9780199562688.001.0001.
[306] Delia Ferri and Fulvio Cortese, *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU*, 2018.
[307] Sabeeh, Umkalthoom. "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract." *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91. https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.

familiarity and experience with the quality of the transactions.[308] All these factors have contributed to the formation of a paradox in the consumption relationship, reflected in the presence of two economically different parties on the one hand and the view of the technical knowledge on the other. The dilemma is manifested through the emergence of a new type of structural imbalance called "inequality in bargaining power.[309]

One of the most straightforward contracts that may be created quickly is the basic loan agreement, which typically favour the more powerful party. Without the chance for prior negotiation or even getting to know the terms of the contract over time, the majority of transactions between a person and a bank have been conducted in the form of per-arranged contracts.[310]

A bank is the first party of the contract, the creator and provider of the standard form of loan contract. The institution's exceptional standing is a result of its technological know-how and technical support. The second party is the borrower and recipient of the service (consumer or nonprofessional), who is weaker in terms of reality, logic, and necessity. This discrepancy has led to the issue of unfair terms and conditions.[311]

The provisions in the popular basic loan contract are frequently printed in tiny type. This is attributed to the preparation by a group of experts and professionals in the field of contract, without the participation of the consumer, whose role is determined

[308]Hussain Abdullah, "Inequality in Contracting Resulting from Unfair Terms (Comparative Study)," *Baghdad University*, 2014, 204–85.
[309]Deborah Aniol, "The Inequality of Bargaining Power in Consumer Contracts," *University of Pretoria* (University of Pretoria, 2015), https://doi.org/10.1017/CBO9781107415324.004.
[310]Sreedhar T. Bharath et al., *Lending Relationships and Loan Contract Terms*, *Review of Financial Studies*, vol. 24, 2011, https://doi.org/10.1093/rfs/hhp064.
[311] Smith, Shelley. "Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis." *Lewis & Clark Law Review* 14, no. 3 (2010): 1035. http://heinonline.org/HOL/Page?handle=hein.journals/lewclr14&id=1055&div=&collection=%5Cninternal-pdf://1237/LandingPage.html.

to accept the terms of the entire contract altogether without any reservation or rejection.[312]

Recent critics have asserted that just because a contract is in a standard form does not suggest that it is an adhesion contract or that there is a difference in negotiating power. If there is no negotiation prior to the contract and the customer has no other options, the standard form contract may be viewed as an adhesion contract, even if it is not one.[313] Accordingly, the present research depends on previous discussions that claimed a personal loan contract to be a form of an adhesion contract with special characteristics, the reason being that the majority of borrowers lack the skills necessary to negotiate the terms. It was acknowledged that even if the borrowers review the provisions of the contract, they will not understand the formulation of the terms. Inevitably, some of the terms will be unfair due to the inaction of the borrowers in drafting the terms of the contract.

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In today's business environment, it could be difficult for an ordinary man to avoid any form of standardized loan contract because such a contract is increasing daily due to consumers' dependence on many organizations that offer such a contract.[314] As the consumers' dependency increases, their ability to negotiate the terms decreases.[315]

[312] Yuk-shee Chan and George Kanatas, "Asymmetric Valuations and the Role of Collateral in Loan Agreements," *Joumal of Money , Credit and Banking* 17, no. 1 (2017): 84–95.
[313] Muhmood, Faek. "Bank Loan between 'Specific and Consensual' Legal and Comparative Study." *Journal of Alsharja University for Legitimate and Legal Sciences* 11, no. 2 (2014).
[314] Trujillo v. Apple Computer, Inc., 578 F. Supp. 2d 979, 992–93 (N.D. Ill. 2008) (damage disclaimer included in warranty was procedurally unconscionable because plaintiff was not given a copy of the contract until after purchase was made); Razor v. Hyundai Motor Am., 854 N.E.2d 607, 623 (Ill. 200 6) (arbitration clause was procedurally unconscionable because it was not available until consumer found contract in glove box of car after purchase)
[315]Brown, "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law."

In some instances, a legislative intervention is considered unnecessary; however, in many other instances which are in isolation, there is an inevitable demand for legislative attention. What remains a concern is "the conflict between people's urgent necessities and their desire and ability to use those needs for their own personal gain at prices that, on the surface, would appear to be excessive." This issue must be addressed if the law is to serve its intended purpose.[316]

A loan contract, due to the specificity of its parties and its place, is the appropriate area that allows a professional to impose his or her power on the borrower from the first moment. This is evident in the terms of the typical type of loan contract being pre-edited and in the fact that the consumer cannot alter them. Such shortcoming has allowed professionals to include unfair terms and conditions in a contract as long as they are certain that the consumer needs the urgent service of the loan.[317]

The evidence supporting the preceding situation is far more common in the realm of standard form loan contracts. In many instances, consumers enter into these contracts due to business necessity. These contracts are solely drafted by a bank, and the bank could devise an extended scope of protection for themselves at the expense of the weaker borrower. In some instances, the drafting of such a contract is made by individual banks or firms with the disposition that the form of the contract be standardized, which later left the helpless borrower with no option other than whatever he or she was presented with.[318]

[316] R. M. Goode, "The Consumer Credit Act 1974," *The Cambridge Law Journal* 34, no. 1 (1975): 79–130, https://doi.org/10.1017/S0008197300092096.
[317] Yuk-shee Chan and George Kanatas, "Asymmetric Valuations and the Role of Collateral in Loan Agreements," *Journal of Money , Credit and Banking* 17, no. 1 (2017): 84–95.
[318] Salisu Malami, "Legal Regime for the Protection of Banking Consumers in Nigeria: An Overview," *UUMJLS* 112, no. 1 (2017): 87–112.

The standard form of loan contract is often presented without "actual consent," a situation in which the consumer (borrower) signs the contract "without knowing it, or at least without being able to do anything about it." This form of contract therefore significantly endangers legal rights to the highest order. Despite this, judges and courts have recognized that the standard form contract is regarded by the law as a legal way to create a contract.[319]

5.3 Modern Consumer Protection against Unfair Terms in the Personal Loan Contract Era

The concept of contract freedom assumes that buyers must take precautions for their own safety or "let the buyer beware." Abdullah, Yusoff, and Zakuan argue that such an idea is inapplicable to customers' contracts in this era because the concept has been violated by irresponsible traders who applied the idea as a shaft mechanism to exclude themselves from the liability, particularly by devising manipulative approaches of contract drafting.[320]

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Furthermore, borrowers lack the knowledge necessary to make judgement about how to assess a consumer loan contract's provision in terms of fairness and balance. As a result, efforts have been undertaken on a global scale to limit the use of unfair terms in contracts, whether within or beyond the purview of contract law.[321]

Over fifty years ago, a political environment gave rise to consumer rights. In his special address to the US Congress in March 1962, President J.F. Kennedy outlined

[319] Jeannie Paterson, "Critique and Comment the Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts," *Melbourne University Law Review* 33 (2009), http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport.
[320] Farhah Abdullah, Sakina Shaik Ahmad, and Zeti Zakuan, "Exclusion Clauses In Consumer Contracts: Malaysia As The Model For ASEAN?," n.d., 1–10.
[321] Ibid.

four consumer rights: safety, information, choices, and voice. These rights then served as a basis through which the UN issued its guidelines. The guidelines were later expanded by Consumers International (CI) to include eight essential consumer rights: (1) the right to basic needs satisfaction, (2) the right to safety, (3) the right to information, (4) the right to choose, (5) the right to be heard, (6) the right to redress, (7) the right to consumer education, and (8) the right to a healthy environment. Regardless, Iraqi legislators have yet to enact concrete consumer protections against unfair contract terms.[322]

5.4 Consumer Protection Measures against Unfair Terms in a Personal Loan Contract with a Bank in the United Kingdom

The UK banking industry has always been diverse. However, due to deregulation and privatization, the British banking industry has seen a number of changes during the past 20 years. The country's retail and corporate banking sectors have been dominated by four main commercial banks, thus reflecting the ranking of the banks in the UK based on their strategic long-term goals. The banking sector in the UK has also reported unprecedented profits annually, and accordingly, the orientation approach of the UK banks has been directed towards shareholders' interest.[323] Such an approach can also be said to be prompted by the UK's competitive environment.

Due to deregulation and changes made to the banking rules, the British banks were forced to contend with intense competition. The entrances of multinational banks and building societies from other European and other countries into the UK market have

[322] Jalil Ibrahim Mahmood, "Dimensions and Areas of Consumer Protection in Iraq - An Economical and Analytical Study of a Sample of Students in the Faculties of Administration , Economics , Law and Politics in Kirkuk University" (St Clement University, 2015).
[323] Anthony Stevenson, "Bank Lending Behaviour a Comparative Study of British and German Banks" (Loughborough University), accessed October 17, 2019, https://dspace.lboro.ac.uk/.

also brought about competitions between the UK banks and the new entrants for a market share, particularly in terms of corporate values, goals, profitability, and overall long-term strategic objectives. In the previous time, emphasis was made to the creditworthiness of a borrower for a loan contract. However, recently, further emphasis has been placed on the entire banks portfolio modelling, thus resulting in the regulatory changes of the whole banking industry.[324]

In the event of loss, it is made mandatory for the banks in the UK to retain their capital. These banks would then determine their retention level. The expected role to be played by financial regulation is to serve as a mechanism for ensuring the protection of consumers. However, the corporate governance practices among the banks appear to be somewhat different because banks that are poorly managed can profoundly have adverse effect on the country's economy. Due to these potential threats, the regulators then placed the responsibilities on the directors who exercise control over the banks.[325]

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New legislation and acts were then introduced in the UK banking legislation following the crises experienced in the region. The promulgation of Banking Acts of 1979 and that 1987 were meant to serve as a direct response to a number of banking crises. For instance, poor management led to the secondary banking crises of 1979, causing the collapse of various fringe banks.[326]

[324]Ibid.
[325]Simon Deakin and Prabirjit Sarkar, "Creditors' Protection Law and Financial Development in France, Germany, UK and USA, 1970-2005," 2012, https://extranet.sioe.org/uploads/isnie2012/sarkar_deakin.pdf.
[326] Penn, Bob, Allen, and Overy. "Banking Regulation in the UK: Overview." *Practical Law Country*, no. Q&A (2018). https://uk.practicallaw.thomsonreuters.com/w-008-0211?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

In the UK, there was no banking regulation prior to the Banking Act of 1979. Simply giving the banks directives, the Bank of England (BoE). Hence, through the enactment of Banking Act 1987, BoE was empowered to facilitate the extraction of information relating to prudential returns and other internal systems from banks. The enactment of the act was mandated by the poor banking practices in the country. The case of Johnson Matthey bankers is a clear example in which the banker had a lending parameter that exceed the requirements placed by the BoE[327]. The absence of banking supervision at that time signified the absence of an early warning or the existence of a fail-proof mechanism that can alert the BoE.[328]

5.4.1.1 The establishment of the financial services authority

In 1997, the labour party made an announcement to relinquish the power of the BoE to a newly formed authority called the Financial Services Authority (FSA). There was also a removal of a regulation relating to the way banks had been treating and dealing with their customers. This regulation was placed with the establishment of the Ombudsman, which to the contrary, focused on specific cases in which banks are involved in dubious dealings. The Ombudsman was empowered to impose heavy fines on banks that were found to conduct poor practices in dealing with their customers.[329]

The Financial Services and Market Act (FSMA) 2000 has taken the role of the Act of 1997. The FSA's wide approach was primarily a risk-based strategy because it regulates all of the banks' financial services. The FSA (1999/2000) effectively

[327] Shamji v Johnson Matthey Bankers Ltd [1991] BCLC 36
[328] Shekhar Aiyar, Charles Calomiris, and Tomasz Wieladek, "Bank Capital Regulation: Theory, Empirics, and Policy," *Columbia Law Review*, 2015.
[329] Brown, "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law."

oversees the regulations governing banks and building societies in its capacity as a super-regulator. This new approach has since served as a standard for ensuring that adequate internal control is implemented and maintained by the senior management of these financial institutions. The FSA was adequately empowered to deal with managers who failed to act in accordance with the new regulatory regime.[330]

To achieve its mandate, the FSA facilitated the engagement of senior management of banks in designing systems and controls, the aim being to protect shareholders, lenders, and customers. This system of regulation, which is tripartite in nature, comprises three steps. First of all, The Bank of England's duties are strictly confined to monitoring UK monetary stability and policy. Second, the FSA, which was given legal authority by FSMA 2000, is tasked with overseeing financial intermediaries. The third responsibility is of the FSA is to oversee the supervision of the conduct of business, securities, and clearing settlements. These obligations imply that the jurisdiction of the Treasury is on the overall structure and governance of the legislation.[331] The Treasury can no longer exercise any responsibilities relating to the FSA or the BoE.[332]

In the UK, there is homogeneity and centralization of banks within locations in London. High competition exists in the Britain banking system particularly from the mergers and acquisitions witnessed recently, thus suggesting the need for the banks

[330]Donato Masciandaro and Marc Quintyn, "The Evolution of Financial Supervision: The Continuing Search for the Holy Grail," *Larcier*, 2015, https://www.suerf.org/doc/doc_8e296a067a37563370ded05f5a3bf3ec_1919_suerf.pdf.
[331] The Treasury is the government department with responsibility for economic and financial policy. The Treasury is responsible for: the overall institutional structure of banking regulation and legislation (including the negotiation of EU legislation), reporting to the UK parliament on serious problems in the financial system and measures used to resolve them and monitoring banking sector resilience to operational disruption
[332]Lorna Mahony, Christian Twigg-Flesner, and Folarin Akinbami, "Conceptualizing the Consumer of Financial Services: A New Approach?," *Journal of Consumer Policy* 38 (2015): 111_117, https://doi.org/10.1007/s10603-015-9293-5.

to deploy economic of scale to gain competitive advantage.[333] In order to coordinate the work of multiple active regulatory agencies, the UK established a lead regulator strategy, especially by integrating them under a revised Act known as the Financial Services Act 2012 (FSA 2012). Then, a new age of UK financial services regulation, known as the FSA 2012, began.

The FSA then overhauled the institutional framework of UK financial regulation in two ways in 2012. The Financial Conduct Authority (FCA) now oversees consumer protection in the financial services sector, replacing the Financial Services Authority (FSA). Second, the FCA replaced the Office of Fair Trading (OFT) as the regulating body for consumer finance.[334]

The FSA 2012 Act was passed to make sure that the UK's functioning markets adhered to the FCA's three main operating goals, one of which was consumer protection. The creation of a new FCA and improved consumer protection delivery for consumers of retail financial services are two further implications of the new legislation.[335]

By opening the door for a more novel strategy, the FSA 2012 Act also pledged to improve consumer protection in the financial services industry. This innovative strategy was developed on the basis of the varied character of customers, who have a wide range of possibilities and capacities for self-protection against the wills of sellers. Though information disclosure remains an important element of consumer protection regulation, its application had not been a standalone solution but has rather

[333] Stevenson, Anthony. "Bank Lending Behaviour a Comparative Study of British and German Banks." Loughborough University. Accessed October 17, 2019. https://dspace.lboro.ac.uk/.
[334] Mahony, Twigg-Flesner, and Akinbami, "Conceptualizing the Consumer of Financial Services: A New Approach?"
[335] Ibid.

been increasingly applied alongside other techniques. A change in strategy from the previously dominant point of sale regulation to a more thorough approach to product and supplier regulation has also been shown by the newly selected nuanced strategy. The latter approach appears to support the application of greater intervention in the prior stages of financial services and product designs so as to ensure that the specification of products meet the requirements of the market for which they are intended.[336]

A new financial regulation approach was introduced through the 2011 White Paper known as "Building a Stronger System." This new strategy seems to be more focused on meeting consumer needs because it acknowledges that different consumer groups require various levels of protection, depending on their unique capabilities and circumstances, the products they choose to buy, and the channel through which they do purchase. The approach also states that the achievement of an effective retail customer protection could be made through the scrutinization of the processes of sales to ensure that fair treatment is given to customers and that the information provided to them is appropriate and transparent.[337]

Section 6(1) (1C) of the FSA 2012 provided the distinct consumers theme by defining the FSA's consumer protection objective as securing an appropriate degree of protection for consumers. In general, the FCA's strategic objective of ensuring that relevant markets function well (section 6(1) (1B) (2)) was meant to promote good outcomes for consumers, through a differentiated and proportionate approach that

[336] "Banking Regulation in the UK: Overview, Practical Law," accessed October 18, 2019, https://uk.practicallaw.thomsonreuters.com/w-008-0211?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[337] Business Department, "Consumer Credit Regulation: Guidance on the Regulations Implementing the Consumer Credit Directive Updated for EU Commission Directive 2011/90/EU (Effective 1 January 2013)," 2013, http://ec.europa.eu/consumers/rights/docs/guidelines_consumer_credit_directi.

takes into account the knowledge and financial sophistication of the various types of consumers.

Further, the definition of the "vulnerable" consumer was also provided by the FCA as someone who may be exposed to certain detriments resulting from their personal circumstances especially when appropriate level of care is absent in the action of a firm. The FCA has recently moved to widen the idea of vulnerability from a narrow focus on people' personal traits to a broad range of surrounding elements. Furthermore, although certain vulnerability causes are long-standing, others may emerge unexpectedly and affect anybody, regardless of money or skill.[338]

The discourse relating to the new policy of consumer protection, post-crisis landscape has been changing between themes. The aim of which was, at one hand, to strengthen consumer protection, consumer concerns relating to mis-selling, and to acknowledge the consumer heterogeneity. On the other hand, it was due to temperament of resilient language relating to responsibility of consumer as well as the re-emphasis on disclosure of information to them and assist them in the avoiding risks and self-protection.[339]

5.5 Legal Framework

State efforts in general and regulatory legislative focus in particular may be able to regulate unfair terms in a consumer credit arrangement. The control can be in the form of pre- and post-agreement regulations for conduct and terms, supervision, or a

[338]Peter Cartwright, "Understanding and Protecting Vulnerable Financial Consumers," *Journal of Consumer Policy* 38, no.2 (2015): 119_138, http://www.consumerfocus.org.uk/topic/vulnerable-consumers.
[339] Stevenson, Anthony. "Bank Lending Behaviour a Comparative Study of British and German Banks." Loughborough University. Accessed October 17, 2019. https://dspace.lboro.ac.uk/.

law that gives redress for the consumer(s). These measures have been found to eliminate exploitation and unfair treatment of consumers hence the assumption of the UK government's concern about consumer empowerment as well as in their addressing of unfairness and exploitation in a loan agreement. The regulatory policy that protects consumers from unfair terms in a loan contract between a creditor and a debtor is built on transparency.[340]

As a member of the EU union, the UK must comply with the union's regulations and directives. From the aforementioned discussion, it could be clearly seen that the UK has its own touch in developing its regulations from time to time to strengthen consumers' position before a bank in a contracting process.[341] In a key comparison research between Ireland and the UK, Kelly claimed that the UK differs from Ireland in how the European Union affects consumer protection from unfair terms. The UK has a consistent and distinguished legislative framework in such an area while the Irish does not follow suit.[342] The section that follows offers an overview of the UK's legislative mechanisms for dealing with such concerns.

5.5.1 Consumer Credit Act (CCA) 1974

The CCA has been one of the most ambitious pieces of consumer protection legislations because it has generated a considerable number of comments upon inception and has continued to provoke attention from academic commentators. The CCA outlines detailed rules on the method of documenting an agreement for hire purchase and consumer credit, and on the information required before and after the

[340] Brown, Sarah. *The Regulation of Consumer Credit: A Transatlantic Analysis*. UK: Edward Elgar Publishing, 2019, 2019. https://books.google.com.my/books?id=wQzADwAAQBAJ&dq=in+2003+the+DTI+in+its+White+Paper:+%22Fair,+Clear+and+Competitive:+The+Consumer+Credit+Market+in+the+21st+Century%22&source=gbs_navlinks_s.
[341] *Banco Santander SA v. Demba and another* (Case C-96/16) and *Cortes v. Banco de Sabadell SA* (Case C-94/17).
[342] Cliona Kelly, "Consumer Reform in Ireland and the UK : Regulatory Divergence before , after and without Brexit," *Common Law World Review* 47, no. 1 (2018): 53_67, https://doi.org/10.1177/1473779518773639.

contract. It also outlines the rules on practices, which includes early and prompt settlement by consumers/buyers and reclamation by businesses. The CCA offers a general annulment right and permits consumers to defy a credit agreement when an "unfair relationship" arises between them and a creditor.[343]

The history of the CCA's 1974 implementation dates back to 1968, when Lord Crowther served as the chair of a special committee established by the UK government to conduct a thorough assessment of consumer credit. The UK government was primarily concerned with redressing unequal bargaining power in a consumer-credit relationship, as well as controlling unfair trade in the credit sector.

The committee criticized the situation by (the Crowther Report) in 1971, stated that,

> *The existing legal system has to be updated since it is insufficient. With a focus on consumer protection, this should apply to all credit transactions (apart from loans secured by real estate). In order to maintain a just balance between creditors and debtors, the law should have three main objectives: redressing bargaining injustice, preventing trade malpractices, and regulating default remedies.*

The Committee then proposed,

> *Specific protections apply to advertising, canvassing, disclosure, contract terms, post-contract responsibilities, and legal procedures. It also recommended a Credit Commissioner with responsibilities for licencing, monitoring, and enforcement as well as the power to enact regulations on certain issues or propose new laws in order to keep the necessary flexibility in the legislation*.

Later, the CCA passed for a new system in July 1974 for consumer protection in their credit transactions. After then, the system was gradually introduced between 1977 and 1983, and it remained unmodified until 2004.[344]

[343]Cliona Kelly, "Consumer Reform in Ireland and the UK : Regulatory Divergence before , after and without Brexit," *Common Law World Review* 47, no. 1 (2018): 53_67, https://doi.org/10.1177/1473779518773639.
[344] Riefa, Christine. "Codification: The Future of English Consumer Law." *Brunel University London*, 2017. https://www.academia.edu/12787579/Codification_the_Future_of_English_Consumer_Law?auto=download.

The CCA should be reviewed in order to keep up with contemporary consumer protection in the credit market, the Department of Trade and Industry (DTI) argued in 2001. A reform involved priority areas to bring more agreements in the regulatory regime and simplify advertisement regulations. As a result, the DTI published a White Paper in 2003 with the goal of enabling consumers to make wise decisions by creating a competitive, effective, and fair lending market. The reformations were suggested to be in the following aspects:

• informative issues before buying

• unexpected after-purchase surprises

• unfair methods

• unlawful lenders of money

• over-indebtedness

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Legislative framework for pre-contractual disclosure, agreements, and early settlement was established in 2004. As the sentence begins with the word "Release," it means that the £25,000 limit for consumer loans has been removed, a definition for individuals has been introduced, the Financial Ombudsman Service's capacity to handle consumer credit complaints has increased, and more post-contractual information is needed. These the priority areas included in the amendments of the CCA 2006 which called (the 2006 Act).[345] One of the major amendments made in the CCA 2006 was the abolishment of the threshold relating to all the financial facilities

[345] Competition and Markets Authority. "Unfair Contract Terms Guidance; Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015." United Kingdom, 2015. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf.

available to individuals. The CCA potentially regulates those facilities irrespective of the amount.[346]

The CCA 1974 is a prescriptive and comprehensive act designed for the regulation of hire purchase agreement and personal credit which lenders and consumers entered into. The Act's regulation is so thorough that it covers every stage of a transaction involving a personal credit, including the advertisement of the facility, pre-contract negotiations, the entering and signing of a credit or hiring agreement, the parties' permission and the agreement's structure, the parties' withdrawal and cancellation rights, the parties' information and copy document requirements, any difficulties that emerge during the agreement's duration, and the parties' right to assert their rights through an appropriate default provision.[347]

5.5.1.1 Definition of loan agreement

The loan agreement has its own standards; its terms are provided in the credit application, at last, it serves as credit agreement. As noted in Principle 7 of the FSA's principles for business, the terms that are basic and important should be fully disclosed by the lenders. These terms are outlined in the credit agreement and include the yearly interest rate, the method by which interest is applied to outstanding balances, any account fees, and the length of the loan, the terms of payment, and any penalties for late payments. The personal loan contract is a non-revolving loan and therefore, it often takes a more extensive credit application. As a result, it usually includes a more formal credit agreement procedure that calls for the credit agreement to be signed and approved by both the lender and the borrower in

[346] S (8)2 of 1947 Act repealed on 6th April 2008 by the 2006 Act, the effect being to abolish the old £25,000 financial limit for regulation.
[347] Andrea Fejős, "Achieving Safety and Affordability in the UK Payday Loans Market," *Journal of Consumer Policy* 38, no.2 (2015): 181–202, https://doi.org/10.1007/s10603-015-9288-2.

the closing stages of the transaction process. Only once both parties have signed the agreement does the contract go into force.[348]

Since defining credit agreement is an important point, the UK regulatory system via the CCA 1947 outlines the prospective consumer credit agreement, which broadly covers the loan agreement in s8. If the loan contract is part of the credit group, "Credit" covers cash loans and any other types of financial accommodations for CCA purposes.[349] In its statutory definition, credit involves a form of straightforward lending via an advance of cash.[350] The CCA 1974 (as amended 2006) applies to "consumer credit agreements" that are entered into between parties; a "creditor" which is mostly a bank and an "individual" mostly a consumer. By implication, the agreement is a form of a credit arrangement entered into for any value between a lender and an individual.[351]

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According to the most recent legislation, a "credit agreement" is defined as a contract between two parties under Article 60B of the FSMA 2000 (Regulated Activities) Order 2001 (RAO). On one hand, an individual or recipient (A) and on the other hand, any other person (B) that act as a provider of a facility, in which (B) provides credits of any sum of money to (A). In the CCA, the definition of "individual' encompasses more than simply natural individuals. For the purposes of the CCA, a person is;

A. a genuine person

[348] Kagan, Julia. "Credit Agreement Defined," 2019. https://www.investopedia.com/terms/c/creditagreement.asp.
[349] S.9(1) CCA
[350] Goode, R. M. "The Consumer Credit Act 1974." The Cambridge Law Journal 34, no. 1 (1975): 79–130. https://doi.org/10.1017/S0008197300092096.
[351] Brown, Sarah. The Regulation of Consumer Credit: A Transatlantic Analysis. UK: Edward Elgar Publishing, 2019, 2019.https://books.google.com.my/books?id=wQzADwAAQBAJ&dq=in+2003+the+DTI+in+its+White+Paper:+%22Fair,+Clear+and+Competitive:+The+Consumer+Credit+Market+in+the+21st+Century%22&source=gbs_navlinks_s.

B. a non-profit organization; or

C. "Small partnerships" are partnerships with three or fewer partners when not all of the parties are corporations.[352]

The regulations within the scope of CCA also include other activities relating to a credit agreement, such as credit brokerage, promotion of credit and hire agreements, advertising as well as hiring and lending. The application of CCA regulation also covers some ancillary activities, including debt adjusting, counselling, collecting, and administration. It also covers credit information services provider, operating as a credit reference agency, and other agreements that are brokered or advertised but not operated as regulated agreements. It is a considered criminal offense to carry on any consumer credit activity that requires a license by any unlicensed person.[353]

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In the amended 2006 act, two categories of exemptions were introduced. These categories are worth for consideration with respect to less understandable facilities which no full regulation was made under CCA. The first important potential exemption category relates to the "business purposes" exemption[354]. The clause in this exemption category specifies that consumer credit agreements are not covered by the CCA laws.[355]in which the creditor granted the borrower a credit amount greater than £25,000, provided that the borrower or hirer entered into the arrangement solely or primarily for his business purposes.[356]

[352] S.189(1) CCA, introduced by the 2006 A
[353] Agueeva, Olga. "Lending to Individuals," 2012. https://res.cloudinary.com/fieldfisher/image/upload/v1574341174/PDF-Files/PDFs from old website/Lending-to-individuals-203384921_onf6ak.pdf.
[354] S.16B CCA
[355] A consumer credit agreement being an agreement between an individual and a creditor pursuant to which credit of any amount is provided, s.8(1) CCA
[356] Rutgers, Jacobien. "Unfair Terms in Consumer Contracts." In *English and European Perspectives on Contract and Commercial Law*, edited by Gullifer and Vogenauer, 270–89. Oxford: Hart Publishing, 2014. https://www.researchgate.net/publication/302995554_Unfair_Terms_in_Consumer_Contracts.

The presumption is that a relevant agreement is assumed to have been wholly or exclusively entered into for business purposes when a declaration is contained into it by the borrower or hirer to that effect.[357] However, the use of this presumption should be avoided when the lender or his representative is conducting the agreement and is aware of or has a good reason to believe that the borrower or hirer is not entering into the agreement solely or primarily for his business purposes.[358] The second category is Exemption for FSA-regulated mortgages, which is "Regulated Mortgage Contracts," It is not covered by the Financial Services and Markets Act 2000 and is not subject to CCA regulation. [359]

Certain CCA provisions give customers the ability to act. Customers have the option to cancel a credit agreement under Section 66A, for instance, but other provisions take effect immediately without the customer's involvement. Example of this is Section 82(1), which prevents a firm from taking into effect any unilateral changes in an agreement except when a debtor is served with a notice in a prescribed manner.

The implication of this is that the lender is required to ensure compliance with the CCA pre-contractual requirements, including its form, format of agreement prescribed in CCA, the CCA's specified processes on the measures to be taken in the termination of the agreement and upon enforcement, as well as content requirements pertaining to the supply of post-contractual information, are supplied here. Therefore, any failure of compliance to the CCA requirements while credit agreement is being

[357] S.16B(2) CCA
[358] S.16B (3) CCA. The provisions of s.16B(3) are anti-avoidance provisions designed to prevent unscrupulous lenders deliberately signing up borrowers on "business purposes" agreements as a means of contracting out of the CCA
[359] Agueeva, Olga. "Lending to Individuals," 2012. https://res.cloudinary.com/fieldfisher/image/upload/v1574341174/PDF-Files/PDFs from old website/Lending-to-individuals-203384921_onf6ak.pdf.

entered into would make the agreement unenforceable even at the absence of a court order.[360]

It is vital to note that lenders who lends to individuals should bear in mind and pay high consideration to the CCA provision regarding "unfair relationships," this provision applies to every agreement entered by the lender with individual debtors. This clause applies to all agreements that were created after 6 April 2007 and are regulated, exempted, or entirely unregulated. The provision also retrospectively applies to any other agreement which was entered prior to such a date, provided that it was yet to be completed fully by that time. The liability is on the lender to disprove any claims made by the borrower regarding the fairness of their dealings, including any claims that the lender is unjust to the borrower.[361]

As a result, the provision of CCA gives the court the authority to "re-open" and modify credit agreements, discharge any obligations under them, order the repayment of any money owed by the borrower, cancel any security offered by the borrower or return it to him, cancel any interest requested by the lender or reduce it, and ask for any other action the court deems necessary to address the unfair relationship in question. [362]

It is significant to note that the term "unfair" is not specifically defined in the CCA; rather, courts use assessments of certain characteristics to define fairness, such as : (i) the process of drafting the agreement ; (ii) whether unfair commercial practice can

[360] Brown, Sarah. *The Regulation of Consumer Credit: A Transatlantic Analysis*. UK: Edward Elgar Publishing, 2019, 2019. https://books.google.com.my/books?id=wQzADwAAQBAJ&dq=in+2003+the+DTI+in+its+White+Paper:+%22Fair,+Clear+and+Competitive:+The+Consumer+Credit+Market+in+the+21st+Century%22&source=gbs_navlinks_s.

[361] Goode, R. M. "The Consumer Credit Act 1974." *The Cambridge Law Journal* 34, no. 1 (1975): 79–130. https://doi.org/10.1017/S0008197300092096.

[362] Financial Conduct Authority. "Review of Retained Provisions of the Consumer Credit Act: Final Report." London, 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF.

be established through the use of misleading statements; (iii) whether borrower's creditworthiness has been checked by lender or that the borrower's circumstances were checked and found to be suitable to the financial product under consideration ; and (iv) the manner in which the creditor interacted with the borrower, including any attempts to enforce or try to enforce the creditor's rights under the agreement. [363]

The primary stage of the loan contract is governed by the UK legal system, which will be examined in more detail in the following topic. Where the advertisement is the offer to negotiate to contract from the lender to the creditor to get the personal loan.

5.5.1.2 The regulation of consumer credit advertisements

The risks implied with the increasing demand for loan by creditors and raise the personal loan providers. Banks often tend to market their loan products in an attractive way to lure consumers into quickly accessible loans, using advertisement such as "your loan available within five minutes." [364]To protect loan consumers, the EU Directive issues rules which state that specific information needs to be mentioned in advertising. Regulations for 2010 that govern consumer credit advertisements (Statutory Instrument 2010 No. 1970). This law specifies the data that must be displayed in a credit advertisement as well as what data must be included.[365]

The former 2004 laws on loan ads were then superseded by the Consumer Credit (ads) laws 2010, which went into effect on 1 February 2011. In terms of the structure and content of advertising relating to the offer of credit, they partially apply the

[363] Ibid
[364] Aliyev, Arid. "Review of the Consumer Credit Directive BEUC Position the Consumer Voice in Europe," 2019. www.beuc.eu.
[365] European Communities. European Communities (Consumer Credit Agreements) Regulations 2010 (2010).

CCD.[366] Some of the criteria under the CCD are essentially new to UK law. According to the legislation, lenders must, among other things, "provide adequate explanations about the credit on offer to the consumer." (Articles 4, 5, and 6, CCD). In regard to all of the member states, in accordance with Article 4(1), "Standard Information must be included in any advertisement for Credit Agreements that mentions an Interest Rate or other data pertaining to the Cost of Credit to the Consumer. The only countries that have adopted this are the Czech Republic, Germany, Poland, Spain, and the United Kingdom. [367]

As indicated, the "standard" relates to advertising. They don't mention cost of credit information, regardless of whether the credit is in the form of an overdraft. As long as there are no standardized statistics or instructive examples, member states are allowed to continue demanding the APR. In member states who want to make it necessary to publish the annual percentage rate of charge for all consumer credit advertising, this article serves as a concession from that obligation. As a result, other member states are allowed to use any of the three standards or none at all when advertising without being required to indicate specific costs associated with credit.[368]

The regulation of consumer credit advertisements is originated from EU Directive and is previously contained in the CCA 1974. Afterward, the rule was incorporated into CONC 3 (Chapter 3 of the FCA Sourcebook on Consumer Credit). The FCA used the authority granted to it in accordance with the corresponding FSMA 2000

[366] Lawrynowicz, Margaretha, Elwira Macierzyńska, Marc Barmscheid, and Shaun Charlton. "Implementation of the Consumer Credit Directive." *Policy Department A: Economic and Scientific Policy* 53, no. 9 (2012): 1689–99. https://doi.org/10.1017/CBO9781107415324.004.

[367] Lawrynowicz, Margaretha, Elwira Macierzyńska, Marc Barmscheid, and Shaun Charlton. "Implementation of the Consumer Credit Directive." *Policy Department A: Economic and Scientific Policy* 53, no. 9 (2012): 1689–99. https://doi.org/10.1017/CBO9781107415324.004.

[368] Weatherill, Stephen. *EU Consumer Law and Policy Elgar European Law Series*. Edited by Revised. Edward Elgar Publishing, 2013. https://books.google.com.my/books?id=rfYBAQAAQBAJ&dq=Information+and+practices+preliminary+to+conclusion+of+credit+agreements&source=gbs_navlinks_s.

regulations to construct this document. Following is a description of a full summary of the consumer credit advertisements regime that is used to regulate consumer credit advertisements.[369]

All businesses that promote (i.e., market) consumer credit products are subject to Section 21 of the FSMA 2000. Financial promotion of consumer credit ads are generally prohibited under Section 21 of the FSMA 2000 unless specific requirements are satisfied. Section 21 states that in the conduct of its business, an authorized person must not extend an invitation or any of form inducement as a means of engaging into an activity relating to investment (i.e., to execute any financial promotion), unless

- the authority is given to such a person through Prudential Regulation Authority (PRA) or the FCA
- approval is given on the content of the communication by an authorized person of the PRA or the FCA, or
- The FMSA 2000 (Financial Promotions) contains an exception for the financial promotion, which is offered.

CONC 3 applies to any firm that conducts regulated, consumer-credit-related activities. The kinds of financial promotion outlined in CONC 3.1.3R are likewise subject to CONC 3. According to CONC 3's general standards, businesses must make sure that,

[369] Lexis®PSL, "Consumer Credit Advertisements, Overview," Lexisnexis, 2019, https://www.lexisnexis.com/uk/lexispsl/financialservices/document/393813/5N3C-M331-F18F-M2YF-00000-00/Consumer-credit-advertisements—overview.

- All financial advertisements, including those that promote consumer credit, adhere to the Treating Customers Fairly (TCF) guidelines set forth by the FCA.[370] As noted in CONC 3.3.1R, regulated activities that are consumer credit-related are those with clarity, fairness and well-informed (not misleading). The CONC 3.3.2R also stipulates that the financial promotion's material must be accurate and properly understandable. The advertisement must also contain appropriate warnings.

Using its authority granted to it by Section 137S (12) of FSMA 2000, the FCA has regulated financial promotions by a number of means, including a prompt direct intervention in firms' cases for the immediate enforcement of the withdrawal or amendment of any promotion deemed to be misleading. When someone disregards the usual rule against financial promotion, he or she will be charged guilty of an offense and should be fined, imprisoned, subjected to public censure, and/or be removed from FCA authorization.[371]

The FCA can intervene on an individual basis or via the use of a theme study, in which case they will focus on a certain industry, sector, or class of businesses in order to identify common issues and communicate their concerns. Additionally, agreements made in violation of the financial promotion prohibition are not binding on customers, and they are entitled to reimbursement for any losses incurred as well

[370] see Practice Note: FCA: Treating Customers Fairly, essentials under the FCA's Principles for Business Sourcebook (PRIN 6)
[371] See FSMA 2000, section 25, 26 and 30.

as the return of any money paid, or property provided or transferred as a result of those agreements.[372]

5.5.1.3 Drafting consumer credit agreements

Formalities are primarily used to increase the possibility that clients would read, comprehend, and, if appropriate, act upon the information in a contract. Such a practice also reduces the risk of a firm presenting (either knowingly or unknowingly) a prescribed content in a way that the messages may mislead or be misunderstood by customers. [373] For instance, mixing or blending vital information with less important information, or emphasizing less important signals while ignoring important ones, may prevent customers from receiving clear instructions on highly critical topics.

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The mitigation of these risks is achieved through the inclusion of prominence requirements. The emphasis on prominence requirements could be in many forms, such as in terms of the size of the text used (boldening or underlining of words) and/or the use of specific or key position in placing some important information within the document. It is possible to define prominence in absolute terms. For instance, specific information must be presented relative to other information (e.g., by stating that it should be viewed as equally important to all other information) or on the opening page of the document.[374]

Due to the complexity of a personal loan contract, the FCA argues that the

[372] Committee, Great Britain: Parliament: House of Commons: Treasury. *Financial Conduct Authority : Twenty-Sixth Report of Session 2010-12, Report, Together with Formal Minutes, Oral and Written Evidence, Volume 1*. Britain: The Stationery Office, 2012, 2012. https://books.google.com.my/books?id=4-NlDFqrxbAC&dq=The+intervention+of+FCA+can+be+made+on+an+individual+basis+or+through+the+application+of+a+thematic+work&source=gbs_navlinks_s.

[373] Khadka, Kabu, and Soniya Maharjan. "Customer Satisfaction and Customer Loyalty." Centria University of Applied Sciences, 2017. https://core.ac.uk/download/pdf/161421179.pdf.

[374] Moloney, Niamh, Eilís Ferran, and Jennifer Payne. *The Oxford Handbook of Financial Regulation*. Edited by Niamh Moloney, Eilís Ferran, and Jennifer Payne. OUP Oxford, 2015, 2015. https://books.google.com.my/books?id=pH6ECgAAQBAJ&dq=The+intervention+of+FCA+can+be+made+on+an+individual+basis+or+through+the+application+of+a+thematic+work&source=gbs_navlinks_s.

> *form requirements can also serve to break down complex and/or detailed information into more manageable sections with the aim of making the document easier to navigate and so more likely that the customer engages with it. Customer engagement, in turn, increases the chance that customers make informed decisions.*[375]

Further, According to The Crowther Report stated that,

> *An essential aspect of protection in consumer credit is the provision of basic information to the consumer as to the terms of the transaction upon which he is embarking. This entails the regulation in some measure of the form and content of the contract document and the prompt supply of a copy of it to the debtor.*[376]

Section 60 outlines the requirements that must be met with regard to the format and substance of regulated hire purchase and credit agreements as a result.[377] Contractual information's main goals include,

- to help clients comprehend the terms of the contract, especially those pertaining to their rights and duties, before deciding to make the contract legally binding on them,
- to protect the consumer from experiencing "surprises" later, such as not understanding the terms and conditions before agreeing to the arrangement; and
- to ensure that adequate document is provided to customers, which can serve as their reference materials during the entire lifetime of the agreement.

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[375] Financial Conduct Authority. "Review of Retained Provisions of the Consumer Credit Act: Final Report." London, 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF.

[376] Financial Conduct Authority. "Review of Retained Provisions of the Consumer Credit Act: Final Report." London, 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF.

[377] Consumer Credit (Agreements) Regulations 1983, SI 1983/1553.

One of the fundamental tenets of the consumer credit regime, according to the FCA, is to make sure that consumers are treated fairly while maintaining their autonomy. The pre-contractual and post-contractual requirements set by the FCA-CONC contain the practical execution of this idea. If the lender fails to make the required pre- and post-contractual disclosures, they may have breached their regulatory duties, and the agreement may not be enforceable without a court order.[378]

5.5.1.4 Pre-contract regulation

The aim of information requirements is to provide protections to consumers by reducing information asymmetry in their relationship with a firm. The rules are intended to empower and enable customers to make knowledgeable decisions, both before and after they enter into an agreement. The requirements include highlighting the costs and key risks. The relevance of this legislative measure in addressing the lack of knowledge among consumers and its eventual effect in bargaining power inequality is noted in the Crowther Report:[379]

> *Many consumers have no understanding or no adequate understanding, of the nature of the commitment into which they are entering or of the cost and other terms or of alternatives that are available to them. They are also ignorant of their legal rights. This lack of knowledge may be due to wanting of intelligence or education on the part of the consumer concerned or it may result from the fact that the information which he is conscious of needing in order to make an intelligent choice is not made available to him, or alternatively is not presented to him in an intelligible form.*

In light of this, a number of CCA clauses mandate that businesses disclose their clients. Nevertheless, the reason why information is needed varies. The unifying goal

[378] Committee, Great Britain: Parliament: House of Commons: Treasury. *Financial Conduct Authority : Twenty-Sixth Report of Session 2010-12, Report, Together with Formal Minutes, Oral and Written Evidence, Volume 1*. Britain: The Stationery Office, 2012, 2012. https://books.google.com.my/books?id=4-NlDFqrxbAC&dq=The+intervention+of+FCA+can+be+made+on+an+individual+basis+or+through+the+application+of+a+thematic+work&source=gbs_navlinks_s.

[379] Brown, Sarah. "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law." *Legal Studies* 36, no. 2 (2016): 230–57. https://doi.org/10.1111/lest.12100.

of all information is to lessen information asymmetry in order to protect customers and give them the ability to make educated decisions. Therefore, it's important to strike a balance between giving customers the correct information at the right moment and the need to avoid overtaxing businesses in the process.[380]

Under the Consumer Credit (Disclosure of Information) Regulations 2010 (SI 2010/1013) (Disclosure Regulations), which are detailed expressly, the pre-contract information obligations under the CCA 1974 are required.[381] Which are made under Section 55 of the CCA. The regulation specifically places requirement on firms to provide a copy of proposed credit agreement to their potential customers. [382]

Pre-contract provisions are based on the Consumer Credit Directive 2008/48/EC (CCD). Articles 5.1 to 5.5 and 6.4 of the CCD contain rules requiring creditors to provide information to consumers prior to certain types of agreements with consumers.[383] CONC 4 summarises these criteria, and the financial services industry, pre-contract obligations, and unfair contract terms and conditions go into further detail about them.[384] Although the judgement won't be definitive, the disclosure of such a truth may be crucial in deciding whether or not an agreement's terms comply with the standards of absolute good faith. There is a need for a balance between the nature of the clauses in an agreement and the steps required to disclose and/or explain to customers about the existence of such a clause. Making very onerous,

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[380] Fejős, Andrea. "Achieving Safety and Affordability in the UK Payday Loans Market." *Journal of Consumer Policy* 38, no. 2 (2015): 181–202. https://doi.org/10.1007/s10603-015-9288-2.
[381] Instruments, Statutory. Consumer Credit, The Consumer Credit (EU Directive) Regulations 2010, Pub. L. No. 1010, 1 (2010).
[382] Mahony, Lorna, Christian Twigg-Flesner, and Folarin Akinbami. "Conceptualizing the Consumer of Financial Services: A New Approach?" *Journal of Consumer Policy* 38 (2015): 111_117. https://doi.org/10.1007/s10603-015-9293-5.
[383] Weatherill, Stephen. *EU Consumer Law and Policy Elgar European Law Series*. Edited by Revised. Edward Elgar Publishing, 2013. https://books.google.com.my/books?id=rfYBAQAAQBAJ&dq=Information+and+practices+preliminary+to+conclusion+of+credit+agreements&source=gbs_navlinks_s.
[384] Lexis®PSL, "Consumer Credit Agreements Overview," Lexisnexis, 2019, https://www.lexisnexis.com/uk/lexispsl/financialservices/document/393813/5N3C-M331-F18F-M265-00000-00/Consumer_credit_agreements_overview.

technical, or sophisticated provisions understandable to customers may involve a lot of work.[385]

The CCA 1974's Section 66A regulates the right to leave a regulated agreement. The EU Directives on Consumer Credit Regulations 2010/1010 (which in turn put the CCD into effect) extended this. The directive and the clause both permit a "debtor" to terminate any other regulated consumer credit arrangement besides an excluded agreement. It is stated that the debtor or customer has the right to revoke any given agreement, even if no explicit explanation is offered. The withdrawal may be done by sending a notice of withdrawal to the creditor within fourteen days starting on the day following the relevant day. The notice of withdrawal may be oral or written.[386]

It is worth noting that the information required under a contract include pre-contract disclosure, content and form of agreement, and copy of documents. Other requirements relate to post-contractual issues, such as notices and statements. All these information must be supplied periodically, or when there is an utmost need for them. However, the provision of others is made on request[387]. The FCA has always believed that un-enforceability makes a strong consumer protection measure possible by assisting businesses in adhering to the form and content standards. The FCA also works to guarantee that customers receive the necessary information at the right time.[388]

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[385] Moloney, Niamh, Eilís Ferran, and Jennifer Payne. *The Oxford Handbook of Financial Regulation*. Edited by Niamh Moloney, Eilís Ferran, and Jennifer Payne. OUP Oxford, 2015, 2015. https://books.google.com.my/books?id=pH6ECgAAQBAJ&dq=The+intervention+of+FCA+can+be+made+on+an+individual+basis+or+through+the+application+of+a+thematic+work&source=gbs_navlinks_s.

[386] Lawrynowicz, Margaretha, Elwira Macierzyńska, Marc Barmscheid, and Shaun Charlton. "Implementation of the Consumer Credit Directive." *Policy Department A: Economic and Scientific Policy* 53, no. 9 (2012): 1689–99. https://doi.org/10.1017/CBO9781107415324.004.

[387] Financial Conduct Authority, "CONC 4.2 Pre-Contract Disclosure and Adequate Explanations," FCA Handbook, 2018, https://www.handbook.fca.org.uk/handbook/CONC/4/2.html?date=2018-01-03.

[388] Authority, Financial Conduct. "FCA Mission: Approach to Supervision," 2019. https://www.fca.org.uk/publication/corporate/our-approach-supervision-final-report-feedback-statement.pdf.

Businesses are not allowed to change how the information is described when there are specific phrasing requirements. Only when the information is crucial to every consumer who would receive it (independent of the type of the goods) and when the information is of particular relevance, is this applicable, for example, information about the legal rights of consumers[389]. The following justification is provided by the FCA:

> *The wording which is not clear or causes customers to react negatively could lead to consumer harm, and also burdens on firms due to queries and complaints. Furthermore, if prescribed wording is not consistent with the rest of the firm's communication, for example in relation to the style of language used, this may reduce its effectiveness.*

5.5.1.5 Terms of the contract

The FCA stated that any attempt to impose additional obligations on a customer, a family member, or any other party in a regulated credit agreement (or linked transaction) is void because it conflicts with the CCA's provisions for the protection of the customer and is therefore unenforceable.[390]

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The rationale of the above policy is to prevent firms from the circumvention of the provisions of the CCA by adding terms that are inconsistent with an agreement. For instance, Section 56 of CCA (antecedent negotiations) prohibits a firm from limiting its obligations particularly by excluding its liabilities for credit broker's misrepresentations.[391]

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[389] Committee, Great Britain: Parliament: House of Commons: Treasury. *Financial Conduct Authority : Twenty-Sixth Report of Session 2010-12, Report, Together with Formal Minutes, Oral and Written Evidence, Volume 1*. Britain: The Stationery Office, 2012, 2012. https://books.google.com.my/books?id=4-NlDFqrxbAC&dq=The+intervention+of+FCA+can+be+made+on+an+individual+basis+or+through+the+application+of+a+thematic+work&source=gbs_navlinks_s.

[390] Financial Conduct Authority, "Review of Retained Provisions of the Consumer Credit Act: Final Report" (London, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF.

[391] Financial Conduct Authority. "Review of Retained Provisions of the Consumer Credit Act: Final Report." London, 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF.

In general, a customer has the right to dispute a contract's terms as long as they conflict with the CCA's or the FCA's laws or requirements. This is because those terms can be considered as unfair terms and therefore cannot be enforceable under the Consumer Rights Act. In fact, a complaint[392] can be made by a customer to the Financial Ombudsman Service.[393]

However, under this situation, it is the customer who will challenge the terms by taking action for the enforcement of their rights, unlike the provision of Section 173, which out rightly makes inconsistent terms unenforceable and void. The success in the outcome of such challenge nevertheless could not be guaranteed. In this regard, the FSMA expressly states that a violation of one of its rules cannot invalidate any transactions. Section 173 must continue in effect with respect to the other sections of the CCA and any other legislation, according to FSMA, because removing it would undoubtedly have a detrimental effect on consumer protection to some extent.[394]

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5.5.1.6 Post contract regulations

Post-contract is a significant measure of the UK's creditor protection. This mechanism is not less important but rather complements the pre-contract mechanism. Post-contractual data meets a range of client demands. The first alternative is for customers to ask for particular information, such a copy of the contract or a statement

[392] The FOS has now replaced the courts as the primary forum for the resolution of disputes between consumers and firms. It is particularly well-suited to resolution of disputes between firms and vulnerable consumers for a number of reasons. First, it is free for the consumers to use. Second, it adopts and inquisitorial rather than adversarial approach to fact finding. The use of lawyers is positively discouraged. Third, and perhaps most crucially, the FOS has significant discretion in decision-making.
[393] Department for business Innovation & Skills. "Consumer Credit Regulations." Vol. 9. London, 2010. https://doi.org/10.1016/s1474-4422(10)70266-0. And Cartwright, Peter. "Understanding and Protecting Vulnerable Financial Consumers." *Journal of Consumer Policy* 38, no. 2 (2015): 119_138. http://www.consumerfocus.org.uk/topic/vulnerable-consumers.
[394] Financial Conduct Authority. "Review of Retained Provisions of the Consumer Credit Act: Final Report." London, 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788713/5857_CCA_FINAL_Report_WEB.PDF.

indicating the total amount due. The relevant regulations or the CCA may in some situations specify the level of detail that must be supplied. Second, a notice including the required information must be sent before a business can take particular actions under an agreement, such as before enforcing the agreement, modifying the interest rate, or terminating the agreement.[395]

The broad term "post-contract requirements" refers to the guidelines for the details that lenders must give borrowers when a regulated credit agreement is in effect.[396] Certain information must be provided periodically, whereas others should be provided on request. This information includes those relating to the copy of a credit agreement and statement of account. Companies that engage in consumer credit-related operations are required to adhere to CONC 6, which contains rules and recommendations on post-contract duties. These rules cover the continual evaluation of creditworthiness, the dissemination of information to borrowers throughout the duration of the contract, and the delegation of rights.[397]

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Additionally, borrowers have the right to terminate regulated arrangements early at any moment. If they decide to do this, they must comply with Section 96 of the CCA 1974's payment requirements and give the debtor statutory notice of their decision. They may discharge all or a portion of their debt as of right, unless the regulated arrangement is secured by real estate. It is unlawful to contract out of that privilege, and lenders are not permitted to deny borrowers their right to an early settlement or

[395] Ibid.
[396] Brown, Sarah. "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law." *Legal Studies* 36, no. 2 (2016): 230–57. https://doi.org/10.1111/lest.12100.
[397] Francisco, and Machado. "Effective Creditor Protection in Private Companies: Mandatory Minimum Capital Rules or Ex Post Mechanisms?" *Elsevier* 67, no. 6 (2010): 14–21. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568731.

to impose restrictions on one. The CCA 1974 early settlement discusses the requirements for early settlement. [398]

According to Article 16 of the EU Directive, [399]It is always possible for a consumer to ask for an early payback. In Article 16 (1) through (3), the effects of early loan repayment are described. (1) Under the terms and conditions outlined in (2), the consumer is entitled to a reduction in expenses, and the creditor is entitled to appropriate and objectively justified compensation for any prospective costs connected with the early repayment. The exclusions are listed in Article 16 (3) after that. [400]

In conclusion, the CCA 1974 and CONC 6 outline the rules governing the modification of consumer credit agreements. Consumer protection is one of the FCA's primary goals. At least in theory, one way to ensure that consumers are protected is to give them an additional level of statutory/regulatory protection by imposing strict rules on the form, content, and ways in which agreements that are covered by the CCA 1974 may be varied.[401] Agreements may be modified or changed unilaterally. Restrictions on altering or modifying consumer credit agreements cover the conditions under which a contract may be changed as well as the relevant practical concerns businesses should take into account.[402]

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[398] Lawrynowicz, Margaretha, Elwira Macierzyńska, Marc Barmscheid, and Shaun Charlton. "Implementation of the Consumer Credit Directive." *Policy Department A: Economic and Scientific Policy* 53, no. 9 (2012): 1689–99. https://doi.org/10.1017/CBO9781107415324.004.

[399] Directive 2008/48/EC of 23 April 2008 of the European Parliament and of the European Council.

[400] Full early repayment is regulated by s. 94 (1) and (2) of the Consumer Credit Act and the Consumer Credit (Early Settlement) Regulations 2004. Partial early repayment may be found in Reg. 30 of the Consumer Credit (EU Directive) Regulations 2010 inserting s. 94 (3) – (6) into the Consumer Credit Act. Furthermore, Reg. 77-84 of the Consumer Credit (EU Directive) Regulation 2010 amends the Consumer Credit (Early Settlement) Regulations 2004 adding Reg. 4

[401] FCA. "FG18/7: Fairness of Variation Terms in Financial Services Consumer Contracts under the Consumer Rights Act 2015," 2018. https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html.

[402] Government, UK. "FCA Consultation on the Fairness of Variation Terms in Consumer Contracts under the Consumer Rights Act 2015." Hogan Lovells, 2018. https://www.hoganlovells.com/blogs/fision/fca-consultation-on-the-fairness-of-variation-terms-in-consumer-contracts-under-the-consumer-rights-act-2015.

5.5.1.7 Right of final decision

A term could be disadvantageous to a consumer if it gives the right to a business to decide the interpretation of a contract or the circumstances in which any breach might occur. When a business can decide on its own part of obligations in a contract, there is a likelihood for effective denial of consumers to seek for redress even in instances where they are entitled to it. Similar to this, when a company is allowed the freedom to choose the meaning of a contract's term, it may be able to modify it to fit its needs. Similarly, there have been objections on the terms that give too much freedom to a business to decide how a contract should be performed, or more importantly, or when a business uses its position to ignore a customer's convenience (e.g., when deciding whether to collect instalment payments). There are also concerns on the terms that give a business the freedom to impose sanctions on consumers, for example, in deciding the amount to a breach from the perspective of the business, regardless of what the law has provided to decide whether the consumer is in a breach of any provision or not.[403]

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In the case of default, Section 86F prevents an owner or creditor from imposing any charge against a customer other than simple interest with respect to the sum defaulted. This is an additional provision made as part of the amendment made to the 2006 Act.[404] Further, a provision is made under Section 86E to give customers a separate notice on the default sum before charging interest on the sum defaulted. Also, Section 93 precludes an increase in the interest being charged by a creditor following the default by a customer. According to this, the rate of interest to be

[403] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"69-71," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

[404] Reifner, Udo, and Michael Schröder. *Usury Laws: A Legal and Economic Evaluation of Interest Rate Restrictions in the European Union*. Edited by Udo Reifner and Michael Schröder. Books on Demand, 2012. https://books.google.com.my/books?id=a7THi5bwnoQC&dq=section+86f+consumer+credit+act+caselaw&source=gbs_navlinks_s.

levied in the event of a default cannot be higher than the rate of interest stipulated in the agreement's original provision (or the rate of the total charge for credit). [405]

5.5.2 Consumer Rights Act 2015

Customers must always be protected against third parties who are skilled traders with knowledge and financial advantages over the customer. Because of this power disparity, it is imperative to defend the weaker party—in this example, the customer. These new cases demonstrate the necessity of establishing an effective legislative framework for consumer protection.[406] In the current economic climate, there is a normal imbalance between suppliers and consumers, and this dynamic frequently favour the supplier. The provider knows more about the good or service.[407]

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An effort was made to consolidate important consumer rights under one roof with the Consumer Rights Act (CRA) 2015. The aim includes consumer contracts for products, services, digital material, and the legislation against unfair terms. Due to significant action at the national level in the UK and the wider level at the EU, priority has been given to these issues. Three directives—the Consumer Rights Directive 2011/83/EU, the Unfair Terms in Consumer Contracts Directive 93/13/EEC, and the Consumer Sales Directive 99/44/EC—have significantly improved Member State law by promoting the idea of the "informed consumer," who

[405] Britain, Great. *Consumer Credit Act 2006: Chapter 14; Explanatory Notes*. London: The Stationery Office, 2006. https://books.google.com.my/books?id=MBjdBc-0qPMC&dq=section+86f+consumer+credit+act&source=gbs_navlinks_s.
[406] Ferri, Delia, and Fulvio Cortese. *The EU Social Market Economy and the Law : Theoretical Perspectives and Practical Challenges for the EU*, 2018.
[407] Laura Rodés Saldaña, "Suitability of EU Legal Capital Rules as a Mechanism of Creditor Protection a Comparative and Functional Study" (University of Leiceter, 2019), https://lra.le.ac.uk/bitstream/2381/45074/1/2019_RODES_SALDANA_L_PHD.pdf.

would be able to assert his or her rights while entering into a consumer contract.[408] As noted by Giliker,

> *For too long consumers and businesses have struggled to understand the complicated rules that apply when buying goods and services ... That is why the Consumer Rights Act is so important in setting out clear and updated consumer rights for goods, services and, for the first time, digital content ... Well-informed, confident consumers are vital for driving continued growth and building a stronger economy.*[409]

The CRA of 2015 went into effect on October 1st. Consumer advocacy organisations have called the move "the biggest shake-up in consumer rights law in this generation." The act has ambitious aims; it seeks the simplification, strengthening, and modernization of consumer law in the UK. Additionally, it aims to compile all key consumer rights in one location, including agreements for products and services, unfair terms, and digital content. The aims of the act are seen as highly impressive as they respond to the legitimate needs of the consumer. Before its creation, consumer law was overly convoluted, inconsistent in certain places, and disjointed.[410]

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Under Section 2 of the CRA of 2015, the terms "trader" and "consumer" are defined. One of the major objectives of the CRA 2015 is to as closely as possible align the meanings of various important terminology used throughout the act and other consumer-related rules. These include defining “trader” and “consumer” as used in contracts and agreements. It's noteworthy that phrases like "service" weren't specified because the Supply and Sale of Goods Act of 1982 doesn't define them. Both Parts 1 and 2 of the Act are covered by the definitions given below.

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[408] Ferri, Delia, and Fulvio Cortese. *The EU Social Market Economy and the Law : Theoretical Perspectives and Practical Challenges for the EU*, 2018.

[409] Paula Giliker, “The Consumer Rights Act 2015 a Bastion of European Consumer Rights ?,” *Legal Studies University of Bristol*, no. March 2015 (2016): 1–25, https://doi.org/10.1111/lest.12139.

[410] Francis Rose, *Blackstone’s Statutes on Contract, Tort & Restitution, 2019-2020*, ed. Francis Rose, 30th ed. (London: Oxford University Press, 2019), https://books.google.com.my/books?id=B9WhDwAAQBAJ&dq=Section+2(2)+defines+‘trader’+as:+a+person+acting+for+purposes+relating+to+that+person%27s+trade&source=gbs_navlinks_s.

5.5.2.1 Trader

In Section 2(2) of the CRA 2015, the term "trader" is defined as "a person acting for purposes relating to that person's trade, business, craft, or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf." This definition replaces the terms "business" (Unfair Contract Terms Act 1977, s.14) and "seller" in the context of operating a business (Sale of Goods Act 1979). To keep things simple and to follow the directive's criteria for maximum harmonisation, the act's writers picked a definition that is similar to one found in Article 2(2) of the Consumer Rights Directive 2011/83/EU (CRD).[411]

Like the definition of "seller" or "supplier" in Article 2(c) of the Unfair Terms Directive, this statement captures the general idea of EU consumer law. This article defines "Seller" as "any natural or legal person acting in the course of his trade, business or profession, whether owned publicly or privately, in contracts covered by this Directive." Similar definitions of "seller" may be found in Article 12(c) of the Consumer Sales Directive: "Any person, whether natural or legal, who, in a contract, sells consumer goods for the purpose of his trade, business, or profession." It is assumed that the term, which covers a wide range of transactions, will clarify the law. Additionally, with rules that are more comprehensive and consistent with the EU's consumer protection system.[412]

[411] Ferri, Delia, and Fulvio Cortese. *The EU Social Market Economy and the Law : Theoretical Perspectives and Practical Challenges for the EU*, 2018.
[412] Giliker, Paula. "The Consumer Rights Act 2015 a Bastion of European Consumer Rights ?" *Legal Studies University of Bristol*, no. March 2015 (2016): 1–25. https://doi.org/10.1111/lest.12139.

5.5.2.2 Consumer

Any consumer legislation must specify the principal receiver of the rights, in this case, the "consumer." An individual operating alone or primarily for purposes unrelated to his or her trade, business, craft, or profession is referred to as a consumer in Section 2(3). This concept is contrasted with the definition of "consumer" found in Article 2[1] of the Consumer Rights Directive as follows: Consumers are defined as "any natural person acting for such purposes with respect to the contracts covered by this Directive outside of his trade, business, craft, or profession." The conclusion is that the UK government's definition of a consumer is broader than the one found in the Unfair Terms Directive (UTD) 93/13/EEC. These are the bare minimum harmonization requirements that can be met. However, it will not apply to small enterprises because CRA 2015 only covered "living" customers.[413]

5.5.3 Principles of unfairness of the contract terms

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In the beginning, Section 5(1) of the UTCCR prohibits unfair terms by saying,

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

There are two key components that need to be considered while defining an unfair phrase. It is unclear if the statement "causes a material imbalance in the rights and obligations of the parties under the contract to the detriment of the consumer and contrary to the requirements of good faith." raises these problems.[414]

[413] Rose, Francis. *Blackstone's Statutes on Contract, Tort & Restitution, 2019-2020*. Edited by Francis Rose. 30th ed. London: Oxford University Press, 2019. https://books.google.com.my/books?id=B9WhDwAAQBAJ&dq=Section+2(2)+defines+'trader'+as:+a+person+acting+for+purposes+relating+to+that+person%27s+trade&source=gbs_navlinks_s.

[414] Willett, Chris. "Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive." *Journal of Consumer Policy* 33 (2010): 247–273. https://doi.org/10.1007/s10603-010-9128-3.

A good example is "Fair Trading v. First National Bank." According to a provision the defendant bank included in its common-form loan agreement, the borrower would continue be responsible for paying interest at the agreed-upon rate until any judgement obtained by the defendant bank were met. This implies that the borrower would be liable for the interest that accumulated throughout the lengthened period when the court extended the term for a loan's repayment after all of the payments required by the ruling have been made. [415]

The director-general of Fair Trading stated that, among other reasons, the term was unfair under the UTCCR. It further stated that it was unlikely that a typical borrower would be familiar with the provisions of the arrangement. A borrower would have known at the time of the decision that if it made all of the required payments, the debt would be discharged. [416]

The trial court decreed that the word required fairness analysis but came to the conclusion that it was not. The Court of Appeal decided that the term was unfair within the meaning of Regulation 4 by granting the director's appeal insofar as it produced an unfair surprise and led to a significant imbalance in the rights and obligations of the parties, particularly by allowing the bank to obtain interest after judgement to which it would not otherwise be entitled without any benefit to the borrower.[417]

[415] [2002] 1 AC 481, 490 (Lord Bingham) ('First National Bank')
[416] Macdonald, Elizabeth. "Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: Director General of Fair Trading v First National Bank." *Source: The Modern Law Review* 65, no. 5 (2002): 763–73.
[417] Dean, Meryll. "Defining Unfair Terms in Consumer Contracts. Crystal Ball Gazing? Director General of Fair Trading v First National Bank Plc." *The Modern Law Review* 65, no. 5 (2002). https://www.jstor.org/stable/pdf/1097616.pdf?ab_segments=0%252Fbasic_SYC-4631%252Fcontrol&refreqid=excelsior%3A39ea77f5a9b70cf8273875c953e85f23.

The House of Lords accepted the bank's appeal. The capacity of the bank to repay its loan with an appropriate interest rate was not a concern due to the term's ability to be reviewed under the UTCCR. The House of Lords did not think the term was harsh either. According to Lord Bingham:

> *The essential bargain is that the bank will make funds available to the borrower which the borrower will repay, over a period, with interest. Neither party could suppose that the bank would willingly forgo any part of its principal or interest. If the bank thought that outcome at all likely, it would not lend. If there were any room for doubt about the borrower's obligation to repay the principal in full with interest, that obligation is very clearly and unambiguously expressed in the terms of the contract. There is nothing unbalanced or detrimental to the consumer in that obligation; the* absence of such a term would unbalance the contract to the detriment of the lender.

The purpose of the CRA's Part 2 is clear-cut. This combines two different pieces of law that formerly dealt with unfair terms in consumer contracts into one piece of legislation. By attempting to combine these provisions, anomalies and overlapping clauses can be eliminated[418]. The Sections 62 to 69 outline the basic fairness concepts. A provision violates the need of good faith and is unfair, as defined by Section 62(4), if it materially distorts the parties' rights and responsibilities under the contract to the prejudice of the consumer. Unlike Section 62(5), which states that "whether a term is fair is to be determined."

When the subject matter or the contract's price cannot be used as a foundation for consideration for the purpose of determining fairness, Section 64 aims to provide additional clarity. As a result, in addition to the criterion of transparency, a new

[418] Giliker, Paula. "The Consumer Rights Act 2015 a Bastion of European Consumer Rights?" *University of Bristol* 37 (2016): 78–102. https://doi.org/10.1111/lest.12139/abstract.

condition of prominence was added. As stated in “Exclusion from the Fairness Assessment”:

(1) When determining whether a clause in a consumer contract is fair under Section 62,

(a) It outlines the primary topic of the contract, or

(b) The appropriateness of the price is assessed by contrasting the amount due under the contract with the goods, digital material, or services offered under it.

(2) Subsection (1) exempts from Section 62 assessments those phrases which are clear and unambiguous.[419]

(3) A term is transparent for the purposes of this section if it is used in an intelligible manner and is readable when written.

(4) A phrase is deemed prominent for the purposes of this section if it is employed in a fashion that would make a typical consumer aware of it.

(5) In subsection (4), the word "average consumer" means a consumer who is ordinarily knowledgeable, observant, and judicious.

(6) This clause shall not apply to any term of a contract referenced in Part 1 of (Schedule 2). The so-called "Grey list" a suggested list of expressions that may be regarded unfair -- is further expanded by Section 63 and Schedule 2 and its purpose is explained.

With respect to the effect of the unfair terms, the act mentioned in Section 62(1) and (2) that (1) in the consumer contract, unfair terms do not bind the customer. A

[419] African Export-Import Bank v. Shebah Exploration & Production Company [2016] EWHC 311, lenders under a syndicated facility agreement had accelerated the loan and demanded repayment. Part of the borrower's defence relied on persuading the court that a set-off exclusion clause in the facility agreement might not be effective. To run this argument, the borrower claimed that the facility agreement, based on a form recommended by the LMA, was (or at least might be) the lenders' "standard terms of business". If that were the case, section 3 of the Unfair Contract Terms Act 1977 (UCTA) would apply to the set-off exclusion clause, and so it would only be effective if it was reasonable. Not surprisingly, the court did not accept the "standard terms of business" argument. It was therefore irrelevant whether the set-off exclusion clause was reasonable, and the lenders obtained summary judgment. Loan agreement terms can be challenged as unreasonable or unfair depends on section 2 and 3 of UCTA, section 62 of CRA and section 140A-C of CCA checklist of the English law rules most likely to be relevant.

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consumer is not bound by an unfair notification that has been supplied to them, either.

One study was done to determine whether there would be a workable way to safeguard consumers against unfair terms in bank contracts. To safeguard Malaysian banking customers from unfair contract terms, it is also debatable whether the UK's CRA 2015 should be implemented. In relation to the previous discussion, researchers have attempted to ease the process of the mechanism of application of Part 2 of the CRA 2015 by presenting it as a table. Their analysis proposed the adoption of such a statutory controlling mechanism to safeguard Malaysian banking customers from unfair terms in the contract.[420] In order to establish such a system against unfair terms in a personal loan contract with Iraqi banks, the current study has this goal. [421]

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Part 2 in general is permeated by the Unfair Terms Directive. The Directive is implemented in Schedules 2, 3, and 5 as well as Sections 61, 62, 63, 64, 67, 68, 69, 70, 72, 73, and 74. It is therefore impossible to contest the directive's significance in shaping the new UK legal regulations. A number of patterns may be seen in Sections 62 (requiring fairness in contract terms and notices), 61 (covering Part 2 of the CRA for contracts and notifications), 71 (requiring courts to take term fairness into consideration), and 64 (excluding fairness examination). It is clear that significant attention was taken to ensure that these regulations adhere to EU law.[422]

[420] Noor Mahinar, Noor Hashimah, and Razali Siti Salwani. "Consumer Rights Act 2015 (United Kingdom): Is It a Good Model in Protecting Banking Consumers from Unfair Terms in Islamic Banking Consumer Contracts in Malaysia?" *JUUM* 22 (2018): 22–31. https://doi.org/10.17576/juum-2018-22-03.

[421] Noor Mahinar, Noor Hashimah, and Razali Siti Salwani. "Consumer Rights Act 2015 (United Kingdom): Is It a Good Model in Protecting Banking Consumers from Unfair Terms in Islamic Banking Consumer Contracts in Malaysia?" *JUUM* 22 (2018): 22–31. https://doi.org/10.17576/juum-2018-22-03.

[422] Giliker, Paula. "The Consumer Rights Act 2015 a Bastion of European Consumer Rights?" *University of Bristol* 37 (2016): 78–102. https://doi.org/10.1111/lest.12139/abstract.

The CMA's guidelines require that when determining whether the act is being followed, consideration be given to the subject matter of the contract, the totality of the circumstances existing during the period of the agreement on the term of the contract, any additional terms of the contract, and the totality of the terms of another contract that the contract in question depends on. [423]

5.5.3.1 Terms and notices excluding or limiting liability

The liability clauses on exclusion and limitations are the restrictions of contractual relationship. These clauses are provided for the limited responsibility of the bidder in the event which may occur without the bidder's guilt and responsibility. Such a restrictive clause, which can produce the effects of bidder's liability, must follow a negotiation that involves all the contracting parties instead of being imposed through exploitation by the dominant person among the parties. This criterion has been broadly accepted and applied in circumstances involving the signing of the standard form loan contract.[424]

The UK Unfair Contract Terms Act of 1977 created the necessity of reasonableness by either nullifying an exemption clause or limiting its use. It is significant to note that only those clauses that typically impact the responsibility for a violation of an obligation resulting from the operation of a business or the possession of business premises are covered under the Unfair Contract Terms Act of 1977. The statute also

[423] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"30," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

[424] Trivun, Silajdžić, and Mahmutćehajić, "Exclusion and Limitation of Liability Clauses in Electronic Contracts"; Stephen Waddams, "Abusive or Unconscionable Clauses from a Common Law Perspective," *Canadian Business Law Journal* 49 (2010), https://heinonline.org/HOL/Page?handle=hein.journals/canadbus49&id=384&div=&collection=.

offers protection to people who behave as consumers. According to the statute, all exemption clauses are either completely ineffectual or only effective when they meet the reasonableness standard.[425]

Any condition that restricts or eliminates a party's liability for death or physical harm (induced by that party's negligence) is absolutely useless in the eyes of the UCTA, in particular. On the other hand, those clauses that aim to limit or exclude liability for loss or damage aside from physical harm or death are subject to the reasonableness test. When the contract was agreed upon, an assessment of the exemption clause's reasonableness should be made. In theory, at least, the real consequences that would follow the breach are therefore immaterial.[426]

Broadly, the consequences of the test of fairness are that there is a possibility for the wording to meet the satisfaction of the law provided that consideration was given to the consumer's legitimate interests in its drafting and presentation.[427] Only when a company uses the wordings to exclude or limit its liability to the detriment of the customer is there any chance of unfairness developing. Such terms are rarely regarded as a disclaimer or an exemption provision.[428]When wording is used to limit or eliminate the ability of customers to pursue the legal remedies to which they are

[425] Iwasa, Luciana. "A Comparative Evaluation of the Legislative Controls on Unfair Terms and Exemption Clauses in Consumer and Business Contracts In England and Brazil." Aston University, 2013. https://research.aston.ac.uk/en/studentTheses/a-comparative-evaluation-of-the-legislative-controls-on-unfair-te.

[426] Azimon Abdulaziz et al., "Towards Harmonisation of the Asean Contract Law : The Legal Treatment of Unfair Consumer Contract Terms Among Selected Asean Member States," *Asian Journal of Accounting and Governance* 2 (2011): 61–65, http://ejournals.ukm.my/ajac/article/view/6542.

[427] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"24," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

[428] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"46," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

entitled, it may be deemed unfair. Even if it wasn't intended to be unfair in this instance, the phrasing would be viewed as such.[429]

As a matter of law, a business that supplies customers with services must accept some contractual obligations. Consumers have a right to anticipate that the services they get will be of a certain calibre and that they will be supplied with "reasonable care and skill." A term in a contract could be considered as unfair or even blacklisted provided that it relieves the obligation of the trader in meeting this standard or limit the consumer from the available remedies in cases where there is a failure to meet this standard.[430]

5.5.3.2 Binding consumers to hidden terms

CMA Guidance[431] notes that

> *the right of consumers to always have a real opportunity to become acquainted with and understand contract terms before they are bound by them. If a term requires consumers to accept the wording of which they have no prior knowledge, it could be challenged as unfair.*

The capacity of the customer to evaluate the terms of the contract may be improved by extending the cooling-off period.[432] After a certain amount of time has passed after a contract is signed, the customer may withdraw from or terminate the agreement without facing financial consequences. This provision is the requirement of the law in some types of contracts and may be helpful to consumers. It cannot be

[429] Ibid s47

[430] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"50," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

[431] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"63 and 64," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

[432] Lawrynowicz, Margaretha, Elwira Macierzyńska, Marc Barmscheid, and Shaun Charlton. "Implementation of the Consumer Credit Directive." *Policy Department A: Economic and Scientific Policy* 53, no. 9 (2012): 1689–99. https://doi.org/10.1017/CBO9781107415324.004.

used as a replacement for giving consumers complete and lucid information before to signing a contract, though. The application of such a provision could not remove any unfairness in a contract caused by the usage of misleading or obscure wording.[433]

Section 82(2) of the CCA is concerned with a situation in which a variation or supplementation of credit is made through a mutual agreement. According to the CCA's provisions, the former agreement is repealed and terminated by this new (modification) agreement. Therefore, any modification of the agreement must be in compliance with the regulations under the CCA with respect to the pre-contract agreement and disclosure, which deals with the specific's provisions for agreement's modification. Additionally, it ought to be a violation of the Part 5 of the CCA requirement. This implies that the client must be informed of and in agreement with all modifications suggested.[434] The Crowther Report states that in order to offer effective consumer protection, modifying agreements should typically adhere to the same standards as the original agreements in terms of their text, execution, and provision of copies.[435]

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[433] Mahony, Lorna, Christian Twigg-Flesner, and Folarin Akinbami. "Conceptualizing the Consumer of Financial Services: A New Approach?" *Journal of Consumer Policy* 38 (2015): 111_117. https://doi.org/10.1007/s10603-015-9293-5. And Government, UK. "Unfair Contract Terms Explained." Vol. 37, 2015.

[434] *Banco Santander SA v. Demba and another* (Case C-96/16), In the first case, the default interest rates on unsecured loan agreements (concluded between individual borrowers and Banco Santander) were 18.50 per cent and 23.70 per cent, compared to ordinary interest rates of 8.50 per cent and 11.20 per cent, respectively. After the borrower's defaulted, the bank sought enforcement of its claim by assigning its debt to a third party in accordance with Spanish law.
The national court referred the question whether, in a loan agreement concluded with a consumer, a non-negotiated term that fixes the default interest rate is unfair, on the basis that the consumer is required to pay a disproportionately high sum in compensation, if they default on the loan, when that interest rate is two percentage points higher than the ordinary interest rate provided for by that agreement.
ECJ Decision: The ECJ confirmed the principle that national courts are entitled to stipulate that certain clauses are automatically unfair. The Spanish Supreme Court established case law that non-negotiated contractual terms must be unfair if they provide for a rate of default interest which is more than two percentage points above the rate of ordinary interest. According the ECJ, the court had followed the ECJ's guidelines for assessing unfairness of a contractual term (Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Case C-415/11)).

[435] European Communities. European Communities (Consumer Credit Agreements) Regulations 2010 (2010).

5.5.3.3 Variation clauses unilaterally

Schedule 2 of the UTCCR identifies any unilateral variation of contract by the supplier without the consent of consumer as a potentially unfair term. The truth is that certain credit contracts contain phrases that ostensibly grant a supplier the unilateral power to alter certain elements of a contract. There is a chance that these clauses will be unfair. Unilateral variation provisions have the potential to significantly skew the rights and obligations of the parties, usually to the harm of the consumer. Not all contingencies that affect a contract's performance can be projected by a supplier, hence resulting into the possibility for using variation clauses by him so as to respond to such contingencies.[436]

Moreover, there could be some situations in which the variations by the supplier are caused by the changes in prudential and regulatory regimes. Despite these considerations, the clause should still be unprotected from being contrary to the principles of good faith. Customers might not be made aware of the existence or even the ramifications of such a clause in this case. This means that a clause may not correspond to the standards of open and fair dealing even though it has been written in clear language and placed in a prominent location. Thus, consumers may lack the understanding of how real such a clause may be used against their interests.[437]

As provided in the law of contract, in drafting an agreement, freedom is given to the parties to a contract for the inclusion of variation clauses they deem to be fit. Nevertheless, such shall adhere to the laws governing unfair contract terms. In

[436] FCA. "FG18/7: Fairness of Variation Terms in Financial Services Consumer Contracts under the Consumer Rights Act 2015," 2018. https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html.
[437] Government, UK. "FCA Consultation on the Fairness of Variation Terms in Consumer Contracts under the Consumer Rights Act 2015." Hogan Lovells, 2018. https://www.hoganlovells.com/blogs/fision/fca-consultation-on-the-fairness-of-variation-terms-in-consumer-contracts-under-the-consumer-rights-act-2015.

relation to regulated credit agreements, for instance, the CCA offers regulation of various variation-related issues. Specifically, Section 82(1) is concerned with a situation in which the creditor or owner unilaterally creates a variation in the agreement, through compliance with the power vested on him by the content of the agreement. In this case, the customer has the right to be notified by the firm prior to the variation. The manner in which the notice to this effect should be given has been prescribed by the regulations.[438]

According to The Crowther Report concerned that,

> *while many regulated agreements contained unilateral variation powers that were entirely legitimate, there was evidence of consumer detriment resulting from use of this power and a failure to notify the consumer prior to the variation taking effect*.

The CCA mandates with relation to interest rate modifications that the creditor shall give written notification of any change in the interest rate linked to a regulated credit arrangement under Section 78A (which implements the CCD). The following three pieces of information must be given in accordance with S 78A's requirements: (i) any changes to the interest rate (including the new interest rate); (ii) any adjustments to the amounts due under the agreement (stated as a single lump sum of money, if practicable); and (iii) any adjustments to the number or frequency of payments.[439]

FCA stated in their report that,

> *We could, in principle, make rules imposing similar obligations on creditors to give notice of unilateral variation to the terms of an agreement and to communicate information to the debtor where there will be a change in the interest rate. A breach of such rules could potentially attract disciplinary sanctions and the FSMA*

[438] Kelly, Cliona. "Consumer Reform in Ireland and the UK : Regulatory Divergence before , after and without Brexit." *Common Law World Review* 47, no. 1 (2018): 53_67. https://doi.org/10.1177/1473779518773639.

[439] "Consumer Credit Directive Number(CCD)," *Financial Conduct Authority*, vol. 53 (United Kingdom, 2013), https://doi.org/10.1017/CBO9781107415324.004.

private right of action. It could not, however, automatically render the variation invalid.[440]

Although a modification clause is a condition that grants the ability to modify a contract's terms after it is enforced, this raises serious questions about whether it might be unfair. [441] The provision would probably lead to blacklisting, especially if such a modification is made without the other party's prior authorization as required by Part 1 of the CRA. The reason is the possibility of unfairness in the variation clause when it is exercised in such a way to subject a consumer to forcefully accept cost increment, additional requirements, or reduction in benefits. An example is a contract in which important elements have not been agreed upon at the time of signing the agreement (e.g., price and terms which give rights to the trader for the sole determination of matters that can be regarded as unfair). Additionally, other clauses may provide the corporation the freedom to modify certain contract provisions as it sees fit.[442]

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However, such a clause may be acceptable if the details were made clear and if the attention of consumer has been adequately drawn prior to his/her entering into the contract. The purpose of such a measure is to guarantee that the customer has been informed of any relevant practical ramifications. It is important to note that some

[440] Goode, R. M. "The Consumer Credit Act 1974." *The Cambridge Law Journal* 34, no. 1 (1975): 79–130. https://doi.org/10.1017/S0008197300092096.

[441] Cortes v. Banco de Sabadell SA (Case C-94/17), The Spanish national court also asked whether the Directive precludes national case law, whereby the consequence of a non-negotiated term fixing the default rate of interest in a consumer loan agreement would result in the complete elimination of that interest, while the ordinary interest provided for in that agreement continue to run.

ECJ Decision: The ECJ stressed that though Article 6(1) of the Directive requires national courts to refrain from enforcing unfair terms against consumers, national courts are not empowered to revise unfair terms. This means, that after deletion of the unfair term, the contract must continue in existence without further amendments. If the continuity of the contract is not legally possible, the whole contract is null and void, unless the annulation is detrimental to the consumer. In that case, it is possible that a national court substitutes a provision of domestic law for an unfair contractual term.
The approach of the national court to refrain from applying an unfair considered default rate term, without substituting alternative provisions, while maintaining the contractual term concerning ordinary interest, was consistent with the Directive.

[442] Elvin, Jesse. "The Application of the Unfair Terms in Consumer Contracts Regulations 1999 Terms in Consumer Contracts." *King's Law Journal* 5768, no. December (2015): 39_63. https://doi.org/10.1080/09615768.2003.11427561.

types of variation clause are likely to exhibit some level of fairness in such situations where the trader fulfils his duty of giving advanced notice of variation and where the consumer is conferred with a genuine right for cancellation of the contract, which can be exercised without serious inconvenience or any loss.[443]

However, it is mandatory, for the purpose of ensuring fairness, to provide consumers with sufficient information before they enter into a contract so that they can project the likely effect of their position. Circumstances can be caused by the variation in clause usage. The customers also need to be aware of the implications the clauses could have on them.[444] In addressing this concern, the FCA has published a detailed report on the factors considered to be relevant in determining the fairness of the terms in a variation clause.[445]

5.5.3.4 Hindering or preventing consumers from taking legal action

Any term that deprives customer a right for seeking redress when there is a default from part of the trader or could limit the customers' legitimate effort to seek for redress could likely be seen as unfair. Part 1 of the CCA provides for blacklisting of such term, which is also considered as unfair under the provision of Part 2 of CCA. For instance, "a provision requiring that disputes be heard in distant or unsuitable courts could unfairly restrict the consumer's ability, in practise, to bring legal action where the trader breaches the contract."

[443] Cartwright, Peter. "The Vulnerable Consumer of Financial Services: Law, Policy and Regulation," n.d.

[444] Trivun, Veljko, Vedad Silajdžić, and Fatima Mahmutćehajić. "Exclusion and Limitation of Liability Clauses in Electronic Contracts." In *The Fourth International Conference on ECONOMICS AND MANAGEMENT OF NETWORKS EMNet*. Vienna: School of Economics and Business, University of Sarajevo, 2010. https://emnet.univie.ac.at/uploads/media/Trivun_Silajdzic_Mahmutcehajic_01.pdf.

[445] Government, UK. "FCA Consultation on the Fairness of Variation Terms in Consumer Contracts under the Consumer Rights Act 2015." Hogan Lovells, 2018. https://www.hoganlovells.com/blogs/fision/fca-consultation-on-the-fairness-of-variation-terms-in-consumer-contracts-under-the-consumer-rights-act-2015.

Many people think it's unfair when clauses require customers to submit to arbitration in any dispute involving £5,000 or less, as opposed to allowing them to do so.[446] The CMA took into consideration the fact that mandating the submission of disputes to ADR, it will attempt to restrict or remove a consumer's right to seek redress through appropriate legal channels, therefore regardless of the procedure type used, it will raise serious concerns about unfairness.[447]

5.5.4 Entitlement of early settlement

The majority of board termination clauses can be found in credit agreements. The provisions of a contract are typically subject to a "default clause," for instance, when parties agreed to a "term loan" that is repayable at a specific future date. Such a default clause mainly gives a lender the authority to "accelerate" repayment by stating that the remaining balance must be paid upon the occurrence of specific events that led to the default. A presentation is normally made with an extensive list of events, which ranges from just minor covenant breaches to other occurrences relating to insolvency. Some of these extensive clauses could be interpreted as a strategy to significantly imbalance the parties' obligations and rights, mostly to the harm of the consumer. This creates an imbalance between the customer and provider with regard to the termination rights since the rights of the consumer are typically restricted with regard to the termination of the contract.[448]

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[446] section 91 of the Arbitration Act 1996

[447] Competition and Market Authority (CMA), *Unfair Contract Terms Explained* (UK: CMA, 2015), under s"77-79," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450410/Unfair_Terms_Explained.pdf

[448] Aqeel Kareem, "Measuring Bank Credit Risk and Its Role in Predicting the Financial Default of Iraq (Impirical Study Banks Iraqi)," Al Mothanna Journal for Financial and Management Sciences 9, no. 2 (2019): 237–50, https://issuu.com/muthjaes/docs/343bd766decf43.

According to Section 94, a CCA client has the right to settle a credit agreement in full or in part before the due date, including by giving notice to the creditor and making the payments required to pay off the outstanding debt after deducting any fees like rebates. Section 96 also notes that in a situation where settlement to the agreement was made in full, a discharge should be made to the customer (and any relative) from impending liability associated with such transaction.

Further, ahead of making the settlement, Section 97 gives right to a customer to present a request for a settlement statement that would show how much would be the cost of settle. In instances where there is a failure from the creditor in providing the statement requested within seven working days, the agreement would become unenforceable. The client can still seek a statement in the event of an early partial repayment, but under Section 97A, the request must specify the payment that was made and how it affected the balance due.

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5.5.5 Effects of unfair terms or notices

Additionally, the CRA gives customers the option to file a complaint with the Financial Ombudsman Service or contest any unfair terms. In accordance with the CRA, the courts may also investigate contract provisions that they deem unfair even if the customer does not object to them. If the court finds any unfair terms, they shouldn't be legally binding on the customer.[449] But unlike the alternatives provided by the CCA, which prevents variations from being adopted (even if the term on

[449] UK Government, "Unfair Tontract Terms, Overview , Practical Guidance for Law," Lexisnexis, 2018, https://www.lexisnexis.com/uk/lexispsl/financialservices/document/393813/5KW8-2K71-F18F-M2F8-00000-00/Unfair_contract_terms_overview.

which they depend is fair) when the proper notice was not provided to the consumer, the options provided by the CRA call for action.[450]

5.5.6 Termination of a credit contract

Section 87 of the CCA provides that when there is a breach of agreement by a customer, the creditor must give notice to that effect before taking certain actions on the customer. This means that the creditor cannot take action relating to the termination of the agreement or present a demand for earlier payment when there is a breach, unless the customer is notified. Such a notification must be delivered to the client in accordance with a predetermined format, and the customer must be allowed at least 14 days to react. The failure of a firm to comply with this provision will prevent him/her from taking any actions against the customer.

The utmost goal of the provision mentioned is to protect the position of the customer against unfairness or hardship, considering that there is a bargaining power inequality with a firm. The safeguard provided by the provision is meant to provide customers a chance for taking action and preclude enforcement by a firm. Therefore, any attempt to do away with this clause is likely to have a detrimental effect on the optimal level of consumer protection. Particularly, Section 87 (default notices) provide significant protection for consumers who are financially challenged.

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[450] J. Beatson et al., *Anson's Law of Contract*, 13th ed. (New York: Oxford University Press, 2016), https://global.oup.com/ukhe/product/ansons-law-of-contract-9780198734789?cc=gb&lang=en&.

5.7 Conclusion

The study concluded that, financially, the UK has been going through rapid and continuous changes in their regulations. Such a progress reflects the country's real intention to provide a perfect regulatory regime to protect the consumers of financial service in general and personal loan contract with a ban in particular. Regarding the banks, the UK has stipulated that all banks must comply with the rules of transparent dealing with consumers. A major piece of legislation and framework governing the regulation of services provided by banks and other financial institutions in the UK continues to be the FSMA 2000.

The FSA 2012's implementation has also made sure that pertinent financial markets operate effectively in line with the FCA's fundamental goals, one of which is consumer protection. This is one of the FCA's three main operating goals. This special issue was meant for exploring the implications of the act hence constituting to the new FCA, so as to ensure effective consumer protection with emphasis to retail financial services users. Its stated goal is to open the door for a high-level approach to financial sector customers' protection.

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The idea for this new approach was based on the notion of consumers heterogeneity, considering that they vary in terms of ability and opportunities for self-protection from sellers. Notwithstanding the fact that information disclosure has remained a key theme in the regulation of consumer protection, there has been an increase in opinion that such a technique should not be used as a standalone but rather as a method to be used alongside other techniques.

This new approach highlights a change in approach from a point-of-sale regulation which hitherto dominated other approaches to a new approach, which provides a greater incorporation of the ex-ante product and supplier regulation. This method involves becoming involved in the product design process at the very end to make sure the final products are appropriate for the market they are intended to serve. There has been a high level of preparedness by the FCA in adopting a broader vulnerability conception. This means the one that gives recognition to the fact that vulnerability sources go beyond the personal characteristics of individuals as it covers a range of other contextual factors.

Regarding the issue of the legal regulations, the CCA, which was passed on 31 July 1974 after many vicissitudes, represents the product of a concentrated labour of nearly six years. The Crowther Committee on Consumer Credit was appointed in 1968, and they were responsible for starting the law. The two-volume report from the committee, which was released in March 1971, examined every area of consumer credit. The committee paid careful attention to the position of the legislation that regulates credit transactions. There was also a conclusion at its early stage of deliberations that consumer credit involving business and consumers should be considered within the general legal framework of credit provisions rather than in isolation. Later, the CCA 1974 went through substantial amendments via the promulgation of the CCA 2006. In the context of the consumer credit markets, the FCA believed that a mix of CCA fines, FCA regulatory authority, and private right of action under FSMA 2000 was necessary. These measures can be seen as appropriate actions.

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The second act for consumer protection in the UK is called CRA 2015. The unfair terms in a contract between a customer and a business are covered by this statute. One component of the CRA 2015 that has to be taken into account is Part 2, which comprises Sections 61, 62, 63, 64, 67, 68, and 69, which outline the general position regarding the fairness of terms and conditions of contracts. There are also other provisions that need to be considered. These include Sections 70 and 71, which deal with law enforcement and the need of courts to take the fairness of terms into consideration, Schedule 2 Part I, which contains consumer contract terms that may be regarded unfair, Schedules 3 and 5, which outline the enforcers' investigating powers, and Schedule 2 Part I, which lists Schedule 2 Part I's investigative powers.

Therefore, the UK's regulation of unfair contract terms aims to equalize the disparity in negotiating power between sellers and purchasers. The idea behind this position is that a consumer's bargaining position is a weak one compared to that of the seller. The result of such an imbalance is that the customer is unable to negotiate or even influence the terms of a contract when those terms are presented upfront by the seller or provider. In the UK, improved transparency was adopted as one of the primary components of the regulatory tools created to address the issue of unfair contract terms.

An exemption clause, which is seen as a product of the laissez-faire tradition, has been used to protect the concept of contract freedom and has been an element of the unfair regime in the trade. As a result, the provision diminished consumer rights in many business agreements. In order to prevent legal action and violations of laws pertaining to consumer contracts, traders must make a sincere effort to comprehend

the new UK regulations in terms of both their practical and legal ramifications. Any nation considering changes or amendments to its consumer protection law, provided that such effort is meant to serve the best interests of consumers, may benefit from the case law that has been developed and regulated in the UK (as one of European Law) on exemption clauses in consumer contracts.

Adopting laws and regulations against unfair contract terms is crucial for consumer protection because it undoubtedly affects business sectors, especially those that deal with standard form contracts for financial services that consumers utilize. Such a measure can eventually ensure an overall fair-trading environment. Therefore, the English common law system both the written and unwritten law–can be viewed as the UK's most important legal aspect.

In conclusion, it has become abundantly clear that both the substance and the form of the standard form contract are addressed by UK law. The standard form contract has typically been viewed as representing unfair practise by businesses against their customers. This suggests that the oppression component of standard form contracts is prioritized by UK consumer protection law, which also discusses the characteristics of small print as one tactic used to fulfil the oppression element in this type of contract. A practice or act is considered unconscionable or unfair if the bank takes advantage of the consumer through mental or physical infirmity, illiteracy, ignorance, lack of time, or the nature of operating environment or surroundings to induce or grossly exploit customer through one-sided in favour of the bank.

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In the majority of UK countries, there is stated concern about the need for improved consumer protection. This is supported by the legislative framework that is in place in the majority of European nations, where tackling unfair terms in consumer contracts has received high priority. The fact is that the UK faces many challenges, more frequently through common trade practices, which lead traders to committing anti-competitive acts. The reality is that consumers have to accept terms and conditions which are seen as unfair, unacceptable, or unreasonable. Therefore, effort have been made to control the unfair consumer contract terms through the various regimes experienced by the UK, and the approach in which the law reform is taking place in its community. Hence, there has been deliberate introduction of the fairness, competitiveness, and efficiency as a solid foundation of modern law in the UK legal system.

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CHAPTER SIX
AN EXAMINATION OF IRAQI AND UK'S INSTITUTIONAL ROLE IN PROVIDING CONSUMER PROTECTION FROM THE UNFAIRNESS IN A LOAN CONTRACT

6.1 Introduction

The purpose of this chapter is to analyse the institutional responsibilities performed by Iraq and the United Kingdom in defending consumers against unfair terms in personal loan contracts. The chapter discusses the Iraqi government's consumer protection framework applied in public authorities and compares the same with that of the UK. Governments may be prompted by consumer protection concerns to implement policies, pass legislation, and establish organizations tasked with monitoring and enforcing consumer protection rules and regulations in order to restrict economic activity that are detrimental to the borrower. Another measure is to implement initiatives or activities to educate the consumers of personal loan contracts on how to take care of their financial interest and preserve their rights.

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The goals of the government are to safeguard and defend bank customers generally, and customers of personal loans in particular. Institutions that serve consumers should take a proactive role in creating a safe environment for them. To make sure that all parties are negotiating on an equal footing, governments should offer oversight and enforcement. Without the active and effective involvement of consumer advocates, regulators usually only hear from the industry, making it hard for them to ensure a fair playing field between customers and service providers.[451]

[451] Adnan Baqy Latif and Bikhtiar Sidiyq Rahim, "The role of associations under the Iraqi Consumer Protection Law No. (1) (2010) Comparative Study.," Journal of Legal and Political Studies 1, no. 2 (2013): 154-84, http://jlps.univsul.edu.iq/issues/vol1n2/jlps-10029 (accessed February 13, 2018).

There are two sections to this chapter. The first section presents findings from research into the function of Iraqi institutions in controlling the interactions between banks' customers and those banks in standard personal loan operations. In the terms of their personal loan agreement with banks, consumers could specify the institutions that should defend their interests from being in a vulnerable situation. It is unclear whether these institutions are willing to care about resolving the problems with the standard form loan contract and protecting consumers from its unjust provisions. To what extent these rules, regulations, initiatives and activities would provide a comprehensive consumer protection and are they effective and enforceable compared with the regulations applied in the UK?

The second part highlights the experience of the government of the UK when it intervened and prohibited banks from carrying out unbalanced dealings in personal loan contracts. The effectiveness of the efforts in protecting the borrowers by utilizing their financial laws and regulations and staff skills to solve the problem of unfair terms still in doubt. Where the powers and obligations of institutional and legal mechanisms are derived through the enactment of laws by parliament or the legislative authority.

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6.2 The Iraqi Institutional Role

The role of Iraqi institutions in protecting consumers from unjust terms in personal loan contracts is examined in this chapter. The analysis focuses on the adequacy of the institutional role in protecting borrowers in Iraq. The next part reviews and examines the role of the CBI as the formal and highest institution concerned about consumer protection in the financial service sector.

6.2.1 The role of the Iraqi Central Bank

The amendments to the Iraqi Banking Law (IBL) included a number of additional provisions. These actions were made in order to strengthen the institutions seen to be crucial for the growth of a free-market economy. The most important program in this area attempted to develop a robust banking sector.[452] Order No. 40 of the IBL, which was published on September 19, 2003 (and amended in a slightly modified Form 13 under Order No. 94, published in June 2004), lays out the legislation creating and administering the new financial system in Iraq. Additionally, this decree creates the framework for future economic expansion and development in Iraq.[453]

The provisions of the Banking Law were greatly inspired by Western ideas. It grants the CBI complete legal and executive power. Most importantly, the Banking Law grants Iraqi banks the same power as modern banks that operate in the present global financial system.[454]

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Bank regulations are essential to the economy of Iraq because of the banks' large involvement in the nation. The federal body is solely responsible for enforcing banking laws in Iraq under the country's constitution. As a consequence, Banking Law No. 94, a significant federal legislation, was passed. According to this law, the Central Bank of Iraq (CBI) is the only government body in responsibility of overseeing the financial sector.[455]

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[452] American University of Iraq Sulaimani, "Introduction to the Laws of Kurdistan, Iraq Working Paper Series Commercial Law II: Banking and Investment Law" (Sulaimanya, 2013), www.auis.ed.iq.

[453] Ahmed Ali, "Banks, Credit and Financial Depth between Iraq and the International Experience," *Journal of Monetary and Financial Studies* 2018, no. 3 (2018), https://cbi.iq/documents/journal of monetary and financial studies. july 2018.pdf.

[454] Robert Looney, "Postwar Iraq's Financial System: Building from Scratch," *Middle East Policy* 12, no. 1 (2005): 134–49, https://doi.org/10.1111/j.1061-1924.2005.00191.x.

[455] Khalaf, Ammar. "A Note on the Soundness of Iraqi Commercial Banking System." *Vinimaya* 32, no. 2 (2012). https://www.researchgate.net/publication/329948876_A_Note_on_the_Soundness_of_Iraqi_Commercial_Banking_System.

Much of the IBL's initial attention was on fortifying the CBI as an essential step for the establishment of a robust commercial banking sector. The passage of a statute governing the CBI, which took effect on March 7, 2004, has been the most significant development. Since March 1, 2004, interest rates have been liberalized, enabling the market to set them in conformity with the IBL's new economic tenets.[456]

Public credit registries are databases that are under the supervision of a government agency, often the central bank or the superintendent of banks. These financial institutions gather data on borrowers' creditworthiness and make it available to current and potential lenders. Foreign parties may lend money to Iraqi parties without violating Iraqi law.[457] The law also does not require that a foreign lender be registered with any specific Iraqi government authority. Also, the licensing requirements outlined in the Iraqi Banking Law No. 94/2004 (the "Banking Law") do not apply to a foreign lender who loans money to an Iraqi. According to Article 3(1) of the Banking Law:

> *No person in Iraq shall engage in banking business without a banking permit issued by the Central Bank of Iraq (CBI), other than a person exempted by the CBI pursuant to paragraph (3) and paragraph (6), where banking business is defined as: "the business of receiving deposits of money or other repayable funds from the public for the purpose of making credits or investments for its own account".*[458]

The Iraqi Civil Code No. 40 of 1951 (the "ICC"), the Commercial Code No. 30/1984 (the "Commercial Law"), the Company Law No. 21/1997 (the "Company Law"), and the Notary Public Law No. 33/1998 (the "Notary Public Law") currently govern the

[456] Maha Mozhir, "Effect of the Structure of Deposits on the Bank Credit in Iraq from 2008 to 2012," *Iraqi Journal for Economic Sciences* 46, no. 13 (2015): 85–112, https://www.iasj.net/iasj?func=fulltext&aId=117558.
[457] Latfe Jabar, "Funding and Financial Reform Process in Iraq," *International Journal of Advances in Management and Economics IJAME* 5, no. 6 (2018), http://managementjournal.info/index.php/IJAME/article/view/62/62"
[458] Dahlia Zamel, "Secured Lending Transactions in Iraq: Defining Market Practice in a Volatile Environment," *International Bar Association Legal Practice Division* (2014): 30-34, http://amereller.com/wp-content/uploads/2016/10/Zamel-Secured-Lending-Iraq-IBA-Banking-Law-Newsletter-September-2014.pdf.

creation and perfection of security interests under Iraqi law. Additionally, rules and guidelines published by the relevant authorities which are frequently kept secret may also apply. The Iraqi parliament has not yet published a single law governing security concerns.[459]

Additionally, on March 6, 2004, Ambassador Bremer issued the Coalition Provisional Authority Order No. 56, which established the new Central Bank of Iraq Law (CBIL).

> *safe, sound, and independent Central Bank for the purposes of achieving and maintaining domestic price stability, fostering and maintaining a stable and competitive market-based financial system, and promoting sustainable growth, employment, and prosperity in Iraq.*

Article 2(1), of the CBIL defined the CBI as

> *A legal entity with the full legal capacity to make contracts, to sue and be sued, and to carry out its functions under the relevant laws. In carrying out its functions, the CBI is empowered to hold and administer property, hire staff and define their duties and compensation, and determine and fund the CBI's budget.*

Article 2(2) of the CBIL safeguards the independence of the CBI by forbidding interference with the CBI's operations or attempts to sway any of its decision-making body's members. Additionally, the CBIL forbids the CBI from receiving directives from anybody or anything, including governmental bodies.[460]

Article 4(1) of the CBIL states that the CBI is entrusted to carry out functions that are commonly done by modern central banks. The functions of the CBI, among others, are as follows:

[459] Khalaf, "The Determinates of Financial Development in Iraq"; Alwattan Voice, "PM, Request to Cancel the Unfair Interest Rate on the Employees' Loans," economy, 2018, https://www.alwatanvoice.com/arabic/news/2018/10/14/1182464.html.
[460] CBI Law Art (2) 2.

1. To develop and carry out the monetary policy of Iraq, including exchange rate policy.
2. To keep and oversee all of Iraq's gold and foreign official reserves.
3. To serve as a budgetary representative and counsellor to the Iraqi government.
4. To print Iraqi money.
5. Develop and promote a reliable payment system in Iraq.
6. To manage and control banks, provide licences and permissions to commercial banks, and provide liquidity to Iraqi banks.; and
7. To gather and disseminate information on the banking and financial industry in Iraq as well as the nation's economy.

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According to Article 4(2), the CBI also has the authority to regulate and oversee non-banking financial entities and to take whatever action it considers appropriate to prevent money laundering and the funding of terrorism. In addition, the CBI may regulate and supervise lending companies. For the purposes of implementing the CBIL, the CBI may issue regulations, but before doing so it should publicly circulate a proposed draft and invite comments[461] from the public. It may also make its own internal rules and regulations as well as commands that are binding on certain people or things.[462]

[461] CBI Law Art (4) 3 and 4.

[462] CBI Law Art (4) 5 and 6.

However, the CBIL does not distinguish between private and government banks and as such all of them must comply with the same regulations and rules.[463] There are also no specific details about the nature of the work of the banks. As a result, each bank has a unique system and set of guidelines that govern how it interacts with its clients.[464] The relationship includes the obligations of each party in the relationship and identify the parts that are subject to negotiation based on the nature of the banking process. The rest, if not most, of the terms and conditions are general in nature and are formulated in advance and as such they are non-negotiable. The latter are usually found in the contracts for personal loans.[465]

The majority of jurists consider the personal loan contract provided by the banks in Iraq to be a contract of adhesion with distinction since the terms and conditions in the set standard contract do not accept any input from the client. Such a limitation raises a problem as to the legal positions of the parties in this type of contract.[466] Interviewee R6 argued that the Iraqi banks' loan contract forms improperly degrade consumer rights because the consumer has no other alternatives but to give his/her consent. Both interviewees R7 and R4 agreed that the country's banking consumers are concerned about the issue because it has persisted for so long. Such a situation may be regarded as contributing to the escalating violations of consumers' rights and humiliation in the banking sector of Iraq.

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[463] Khalaf, Ammar, and Aqeel Muhummad. "Early Warning Report for the Banking Sector First Chapter 2018." Baghdad, 2018. https://cbi.iq/static/uploads/up/file-153682680559797.pdf.
[464] Latfe Jabar, "Funding and Financial Reform Process in Iraq," *International Journal of Advances in Management and Economics IJAME* 5, no. 6 (2018), http://managementjournal.info/index.php/IJAME/article/view/62/62.
[465] Michael F Silva, Sophia Vicksman, and Sophia R Vicksman, "A Central Banker in Iraq," *Journal of International Business and Law* 3, no. 1 (2004), http://scholarlycommons.law.hofstra.edu/jiblAvailableat:http://scholarlycommons.law.hofstra.edu/jibl/vol3/iss1/1.
[466] Barak, "Consumer Protection from Arbitrary Terms"; Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power"; Moosa, Hshem, and Mashaf, "Commitment to Warn in Consumption Contracts."

The CBI has implemented a number of initiatives to advance consumer protection in the financial sector since it increases consumer trust and improves banking quality. It also aims to improve legislation and bolster its oversight[467]. In order to safeguard borrowers against unfair terms in a personal loan contract, this research set out to assess and evaluate the CBI's Consumer Protection Guide, which is a part of the regulatory system. To what extent this guide could be effective to protect borrowers and balance their inequality bargaining power with banks in terms of Issuance, enforcement?

The CBI has released a manual that adheres to the idea of openness.[468] to safeguard those taking part in financial and banking activities made possible by Iraqi banks. The CBI has also endeavoured to provide an appropriate environment to preserve the rights of customers in a balanced relationship.[469] The guide was prepared based on the instructions of Central Bank No. 9/1/7/427 of 7/11/2016, which were circulated to all banks for it to be applied in their dealings with their customers. It is the responsibility of the banks to take the necessary measures to apply the principles and controls set out in the guide. As such, the bank's board of directors must develop a new policy that is based on the guide for the banks to implement. The banks should comply fully with the guide from the date of its issuance.[470]

According to the researcher, taking this action is essential to establishing consumer protection laws in the financial industry as a whole and balancing the consumer's position in personal loan contracts in particular. The procedure could also address the

[467] Latfe Jabar, "Funding and Financial Reform Process in Iraq," *International Journal of Advances in Management and Economics IJAME* 5, no. 6 (2018), http://managementjournal.info/index.php/IJAME/article/view/62/62
[468] CBI reached up to 11% in the international measures that established in 2015 to encourage banks to share their monetary policies.
[469] Central Bank of Iraq, "Consumer Protection Guide," 2016, 25, https://cbi.iq/news/print_news/599.
[470] Ibid.

need for such regulations in the future hence facilitating the relieving of borrowers' burden by decreasing their transections challenges in dealing with banks.

In line with the above argument, the World Bank has issued guidelines and standards on financial consumer protection at the international level. Hence, many countries have established a robust regime at the national level. For example, to address the requirement to safeguard borrowers' rights in their dealings with banks, the Financial Services Act 2012 in the UK, the updated CCA 1974, and the activities of the Financial Conduct Authority FCA were all approved. This led to the establishment of the United Kingdom initiatives. The latter is in charge in supervising, issuance, and enforcing the rules and regulations enacted. [471]

In Principle one of this guide, consumer protection is defined as

> *The measures applied to reduce the risks to customers in their dealings with banks through the development of regulatory frameworks of policies and procedures to ensure access to the various financial services within an integrated framework of disclosure and transparency in financial dealings. It also ensures that they have access to their rights without diminishing and not harming their interests and hold those who transcend these regulatory frameworks accountable.*[472]

Pertaining to the principle above, the consumer protection process is based on three dimensions: (1) the supervisory dimension is basically concerned with the role of the supervisory institutions; (2) the legislative dimension is basically concerned with the mandatory framework and the appropriate penalties to be imposed on banks for noncompliance; and (3) the educational dimension is about raising the level of

[471] in addition, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 in the USA setting up of specific public institutions such as the Consumer Financial Protection Bureau.
[472] Central Bank of Iraq. "Consumer Protection Guide," 2016, 25. https://cbi.iq/news/print_news/599.

knowledge of the financial and banking culture so as to raise the consumers' ability to make the right decision that enhances their protection.[473]

The CBI's Consumer Protection Guide complements the CBI's implementation of its 2016–2020 strategic plan to transform banks that are currently using the tools of the twentieth century to those that are competent to work in the twenty-first century. This guide is applicable to all the banks in Iraq. It also has the basic principles of consumer protection in dealing with banks. The following are the guiding principles: fair and equal dealing, disclosure and transparency, financial awareness and education, professional behaviour, safeguarding customers against financial fraud, maintaining the privacy and confidentiality of information, handling customer complaints and grievances, competition, and conflict of interest.[474]

R1 commented on the previous vision of the CBI' strategy plan:

> *I am sure if these rules and principles enforced, and it been compulsory then it will be right leap in protecting vulnerable consumer of the financial service in Iraq in general and in the standard form personal loan contract in particular.*

R4 hoped that the guide would receive a proper enforcement authority from a related association. Otherwise, the guide is seen as the Consumer Protection Law 2010, which was unenforced and therefore did not serve the borrowers' protection in dealing with the banks.

The guidance emphasizes the use of open and honest methods in promoting its banking services and goods when it comes to sharing information about banking

[473] Central Bank of Iraq. "Consumer Protection Guide," 2016, 25. https://cbi.iq/news/print_news/599.
[474] Central Bank of Iraq. "Strategic Plan for (2016-2020)." Baghdad, 2017.

services and products. A written copy of the general and unique terms of a loan contract must also be provided by banks. In addition, the banks are required to hire people who are qualified and trained to deal directly with clients, depending on how sophisticated the product or service.[475]

While the CBI reached the maximum number of changes in transparency, reaching 11 out of 15 according to (GDDS) indicator publish information in 2017. The CBI began a new era and a new vision of one objective and dimension to the institution has multiple dimensions and goals. The CBI appears to be moving towards achieving financial stability and economic growth, particularly by encouraging strict control and disclosure during its strategic plan (2016-2020), in response to developments and challenges in the world from the tools of the twentieth century to the tools of the twenty-first century.[476]

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All banking rules and regulations must be made available on an official website. The website should also educate customers and make them aware of (1) their rights and duties and (2) how to make a formal complaint. The website must also contain a list of frequently asked questions and answers. The researcher is in view that such requirements are very significant for two reasons. First, the new era of technology requires an authentic and "easy-to-deal-with" platform for borrowers who wish to choose a product and service. Second, the researchers could easily get information about the banks' policies and research on the issues in an effort produce solutions and propose enhancements to the existing rules and regulations.

[475] International Monetary Fund. Middle East and Central Asia Dept. *Iraq: 2019 Article IV Consultation and Proposal for Post-Program Monitoring-Press Release; Staff Report; and Statement by the Executive Director for Iraq*. International Monetary Fund, 2019, 2019.

[476] Shamoun, Najlah. "Analysis of the Transparency of the Central Bank of Iraq and the Policy of Reporting Monetary Policy." *Journal of Monetary and Financial Studies*, no. 3 (2018). https://cbi.iq/news/print_news/599.

As stated in the ninth principle of the guide, a bank must publish and develop a comprehensive annual plan with specific programs to raise consumer awareness together with the participation of nongovernmental organizations, civil society organizations, and scientific institutions interested in consumer protection issues. The purpose is to develop and implement financial and banking awareness programs. Banks may conduct surveys to measure consumer awareness and the impact of measures to raise awareness and financial education for the purpose of evaluation and developing new measures. In this regard, the CBI is sponsored by the Journal of Monetary and Financial studies, which is published twice a year by the research and statistical division. This journal discusses a variety of studies on the monetary policies in Iraq. [477]

Financial inclusion is considered as a preference goal by the CBI. Many efforts have been made to foster such inclusion to raise the contribution of the financial sector in economic growth and consumer protection. However, the reality is that more efforts are needed to promote and extend the financial inclusion in Iraq through financial literacy and consumer protection.[478]

Under the eleventh principle regarding the advertisement and announcement, the advertising of banking products and services should be accurate and true because it will entail consumer decisions. The texts of the advertisements should be clear and easy to read, can be understood by the public in general, and have the appropriate clarification of the risks. The banks must also set up customer complaints units to answer inquiries and provide clarifications on those announcements. This principle

[477] Shamoun, Najlah. "Analysis of the Transparency of the Central Bank of Iraq and the Policy of Reporting Monetary Policy." *Journal of Monetary and Financial Studies*, no. 3 (2018). https://cbi.iq/news/print_news/599.
[478] Khalaf, Ammar Hamad, and Azhar Hassan Ali. "Financial Inclusion and Economic Development in Iraq." *International Journal of Science and Research (IJSR)*, no. December 2018 (2017). https://doi.org/10.21275/ART20177491.

should be taken seriously since there many effected cases mentioned earlier in chapter four regarding consumer issues and unfair procedural terms.[479]

An advertisement in a trusted standard could lead to an important and significant role in enlightening borrowers with essential information thus helping them to choose a proper personal loan product. Yet, banks may use this tool to lure the consumers of personal loan with attractive facilities and advantages.[480] An advertisement means could trespass the restriction of the law and regulations and may mostly reach fraud hence misleading borrowers. As a result, borrowers who signed the contract of a personal loan are trapped in confusion and the mistake associated with unfair terms. Thus, the issue of a deceptive advertisement requires serious consumer protection, particularly since there is an uncertain provision in the CPL 2010, which has an uncertain mechanism of enforcement.[481]

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Whereas, the consumers in the UK also have the legal right in the CRA 2015 under Part I and FSMA to be protected from a misleading advertisement. [482]Regarding the enforcement of CONC 3, the FCA regulates financial promotions. According to Section 137S (12) of FSMA 2000, anybody who violates the general ban on financial promotion may be prosecuted with an offence and may face penalties such as fines, jail time, public reprimand, and/or the withdrawal of FCA authorization.[483] (The legal framework in chapter five provides more information on regulating such advertisement)

[479] See Chapter four, Procedural Unfairness leads to Unfair Contractual Terms
[480] Moosa, Hasan, Ahmed Hshem, and Muthanna Mashaf. "Commitment to Warn in Consumption Contracts." *Journal Of the College of Law /Al-Nahrain University* 19, no. 2 (2017): 155–80. http://theses.gla.ac.uk/5452/.
[481] Hashem, Ahmed, and Muthanna Abdulkadhim. "Consumer Protection from Misleading Advertisements." *Journal of Alqadesya for Law and Political Sciences* 9, no. 2 (2018): 201–24. https://iasj.net/iasj?func=fulltext&aId=165851.
[482] Conway, Lorraine. "Consumer Rights Act 2015." London, 2017. tps://www.google.com/#q=Consumer+Rights+Act+2015+By+Lorraine+Conway.
[483] See FSMA 2000, section 25, 26 and 30.

Furthermore, the Bank Negara of Malaysia (BNM), which is in charge of overseeing financial institutions, established the IFSA 2013 with the goal of safeguarding the rights and interests of its clients. Financial service providers are forbidden from engaging in Schedule 7's banned business activity, which is harmful to financial customers, under part IX of the IFSA 2013. Such a violation may result in a sentence of up to five years in prison, a fine of up to RM10 million, or both. Additionally, according to the Guidelines on Product Transparency and Disclosure, a bank must treat banking customers fairly, appropriately, and without misinformation in its promotions, marketing materials, and contract terms and conditions.[484] The decision in Affin Bank Berhad v. Datuk Ahmad Zahid Hamidi mandates compliance with these guidelines and circulars by all Malaysian banks. As the country's Central Bank and regulatory body, Judge Abdul Malik said that all banks in the nation should adhere to BNM regulations as a matter of policy and for the sake of the nation.

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The guide contains the detailed instructions to be complied with by all banks for all loans.

1. Obtain authorization from the borrower to inquire about his credit card data and loans obtained from other banks, insurance companies and other organizations. In addition, a signed statement is required from the customer of the status of previous loans that he or she has taken from other organizations. Probably this section might be designated to check over-indebtedness. The CBI does not, however, explain why this part was added. In the UK, the FCA's CONC 6 regulates creditworthiness and provides instructions on post-contract responsibilities. These rules include the requirement to continuously evaluate

[484] Noor Mahinar, Noor Hashimah, and Razali Siti Salwani. "Consumer Rights Act 2015 (United Kingdom): Is It a Good Model in Protecting Banking Consumers from Unfair Terms in Islamic Banking Consumer Contracts in Malaysia?" *JUUM* 22 (2018): 22–31. https://doi.org/10.17576/juum-2018-22-03.

creditworthiness, the disclosure of information to borrowers during the term of the contract, and the assignment of rights. [485]

2. The banks shall determine certain policies to give the consumer a specific period of review. The consumer should be given an overview of all the financial implications of the loan, as well as the contractual terms and obligations that he/she will incur once he/she signs the loan contract. During the review stage, the borrower should be given a clear and simple table that includes the following statement:
    a) The overall number of payments and the amount of each payment.
    b) The loan's interest rate and the total amount that will be paid to the bank at its conclusion.
    c) The total amount of interest that must be paid before the loan term is over; and,
    d) a statement that the monthly instalments may increase as every five years the interest rate of the loan taken may increase by a maximum of 2%.
3. The banks shall not obligate any of its customers to purchase a service or other products as a condition to provide a service or a related product; and,
4. the following details should be included in every loan contract at the very least:

a. A statement

b. Basic customer data;

c. Type of loan;

d. Loan amount;

[485] Anthony Stevenson, "Bank Lending Behaviour a Comparative Study of British and German Banks" (Loughborough University), accessed October 17, 2019, https://dspace.lboro.ac.uk/.

e. Purpose of the loan;

f. Loan period;

g. The customer's account that will be used to pay the monthly installments;

h. The loan's relevant interest rate, as required by the CBI, so that the borrower is fully informed of the transaction's complete cost, and the bank must maintain documentation proving that this step was taken.;

i. A copy of the loan contract with the customer's signature is provided to him as prove.

The researcher is in view that the two previous principles are satisfactory and are good requirements for borrowers. However, the necessity to protect personal loan consumers has become more significant after the financial markets became complex and after contracting involves serious, long-term financial consequences. On the borrower's side, an increase in consumer independence in sophisticated financial markets like banks would give rise for alarm when they are intended toward present consuming and lack the knowledge capabilities to take a sound financial choice. Otherwise, the behavioural difference of consumers coupled with the complexities of modern standard form personal loan contract would leave consumers handicapped in transacting with banks in Iraq, particularly for those groups who are in need for a loan to cover urgent expenses. Consequently, the combination of consumer protection regulation with supervision and penalization is justified because such a measure can contribute to distributive fairness in situations where bargaining powers in the market are unequal.[486]

[486] Rahilah Ibrahim, Ili, and Habib Ahmed. "Financial Consumer Protection Regime in Malaysia: Assessment of the Legal and Regulatory Framework." *Consum Policy* 41 (2018): 159–75. https://doi.org/10.1007/s10603-018-9369-0.

In summary, the CBI's guide provides the minimum and basic protection measures to borrowers. The project in issue is the only one the CBI is working on right now to accomplish the objectives listed in its strategic plan for 2016-2020. By emphasising consumer protection in bank transactions generally and the customer in particular, the CBI made the right choice. Basically, the CBI role is to satisfy the consumer by imposing on the banks the important areas for regulating the rules and regulations and supervision of consumer protection education, disclosure, transparency, and enforcement powers.

This research will highlight some of the issues in the guide. First, this guide is considered to be merely a manual for the organization of banks. Second, the CBI does not have any agency to supervise the implementation of the rules. Third, there are no prescribed sanctions that can be taken against the offending banks and there are also no remedies for the consumers. Fourth, because it does not outline any strategies for regulating these forms, the guidance does not address the problem of unfair terms in the typical loan contract.

In order to learn from the UK's experience and offer suggestions for improving borrower protection, this study examined the institutional role of the UK in ensuring the supply of the highest level of consumer protection in the standard form of personal loan contract.

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6.2.2 Complains handling and dispute settlement

Having supervisory control for consumer complaints could function as a significant role in robust consumer satisfaction and loyalty. At a certain stage, every bank organization has to deal with the unfairness in contract terms and dealings. It might be difficult to deal with these clients and restore the customer's faith in the product or service. For the time being, if banks want to provide customer happiness and cultivate loyalty, they must positively excite customers. It is crucial to pay attention to customer concerns, demonstrate understanding of their issues, and ask questions in a kind and interested way. Defend the client and work to resolve the issue as a team. Review the issue with the customer and take the challenge to resolve it in a positive way. The most important actions for a bank to take when dealing with injustice in a consumer contract are customer feedback and comments. Such a measure is a significant mechanism for banks to improve their transactions and product services.[487]

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The second principle of the CBI guide states that,

> *In accordance with the consistency of the best practice for effective banking supervision to extend the supervisory role to ensure providing proper policies and procedures in banks. Involving a strict rule relating to the compulsory extensive care to consumer protection and to reinforce the application of high practice functional standards in the financial service. Then this guide included principles and rules to be adhered by banks in transacting with consumers to have complaint handling and dispute settlement between banks and consumers.*

[487] Khadka, Kabu, and Soniya Maharjan. "Customer Satisfaction and Customer Loyalty." Centria University of Applied Sciences, 2017. https://core.ac.uk/download/pdf/161421179.pdf.

However, the contemporary norms of consumer protection appear to be very different in terms of protection from unfair terms for those contained in the general rules. Those contemporary rules contained in the new forms of protection against unfair terms were unknown under the traditional rules, thus leading to the censorship stressing pre-set terms, which have often been an injustice. This emphasis of control inevitably leads to pushing professionals who may be thinking of gaining advantage over the weak position of the consumers, thus prompting them to reformulate terms and conditions of standard forms contracts that they produce to market. Since the matter is no longer limited to civil sanctions on those unfair terms. It is considered to be punitive and represented in the fine, particularly in the Algerian law. [488]

To address the aggravation of borrowers against unfair provisions in a personal loan contract, there are no specialized consumer protection tribunals or ombudsman in Iraq. According to the Judiciary Organization Act Law No. 160 of 1979, the two divisions of the courts are the civil and criminal courts. The civil courts are composed of the appellate courts and civil courts. Major crime courts and minor crime tribunals make up the criminal courts. The Court of Cassation hears appeals from decisions made by the minor criminal tribunals and serious crime courts. The Iraqi Constitution does not permit the creation of consumer protection tribunals; however, the Federal Supreme Court of Iraq may be constituted.[489]

Iraq's legal system is based on civil law; hence all institutions are bound by its rules. For example, the Civil Procedure Act of Law No. 83 of 1969 stipulates in Article 6

[488] Ameen, Cea. "A Comparative Study on Unfair Terms in the Consumer Contract." Abu Baker University of Talmasan, 2008.
[489] The Foundation of Iraqi Legislation – Legislation No. 160 issued on 12/10/1979, Judicial Organization Law No. 160 of 1979 Source:" Alwaqai Aliraqiya" Issue (2746) on 12/17/1979 Part 2 / Set of Laws and Regulations of 1979.

that the plaintiff in a case "must have an acknowledged, reachable, feasible, and demonstrated interest.[490]

Therefore, the ability of courts to modify contracts is a violation of the long-standing legal concept of contract freedom. According to this idea, the judge must accept the agreement reached by the parties and adhere to its application just as they must respect and apply the law. The contract will not only create legal obligations between the contracting parties but will also require the judge to apply its provisions.[491]

In spite of this legal need, the Iraqi legislature gave the judiciary the power to interfere in the contract and to annul and change certain of its elements in order to establish an economic equilibrium between the contractual parties under Article 167 of the ICC. This exception must be based on a solid legal basis which can be justified and expressed. The contract may have terms that are being accompanied by unjust and unfair terms in which to the obliging party, who has not entered into the contract, cannot be satisfied except under his or her urgent need for the good or service. In such a situation, the judge may intervene to mitigate these terms. This may lead to the dismissal of the terms or mitigation of the party involved, particularly by amending the terms so that the contractual relationship is settled.[492]

If the agreement was established by adhesion (compliance) and has unfair terms and conditions, the court may alter the agreement or exclude the injured party from it in line with the rules of justice. In the interests of justice, the judge will use his

[490] Mahdi, Asmaa. "An Analysis of The Legal And Institutional Framework In Administrative Law Regulating Air Pollution In Iraq." University Utara Malaysia, 2018.
[491] Azwawo, Ajood, and Aiet Mawhob. "The Role the Will in Forming a Contract." University of Bgayet, 2017.
[492] Sabeeh, Umkalthoom. "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract." *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91. https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.

discretion to assess how unfair the circumstances are.[493] If in his opinion, he finds any unfair term and condition in the contract, he may amend it to the extent that it is still possible to save the contract. The effect of this unfairness is that the judge can also revoke the contract.[494]

The ICC 1951 gives the courts broad discretionary powers, but only to adhesion contracts. Due to the new generation of contracts, which are somewhat similar to the adhesion contract, the judges' task will be challenging and unfair without additional consumer protection indicating the potential for unfair terms to be included in the consumer standard form contract. The new generation of contracts are, to a certain extent, similar to adhesion contracts. However, without a special consumer rights protection law, the judges' hands are tied.[495]

Nevertheless, the personal loan contracts are not identical to adhesion contracts and therefore, the provisions for adhesion contracts cannot be applied. Judges will have to look for other legal provisions, and if there are any, to rule in favor of the consumer[496]. The borrower must also prove that he or she was aggrieved, and that the bank exploited him/her. Other difficulties the borrower will encounter include the lawsuit's procedures, unavailability of specific court or tribunal, and the uncertainties involved with the application of the provisions of the adhesion contracts.

[493] For example, The decision of the Civil Court of Karrada No. 328 / B / 86-87 in 24/11/1987, in which it decided to reduce the interest rate to 7% after it was 25% in a mortgage contract between the applicants and obliged the defendant to return what was paid in excess by the plaintiff about this amount, and this decision was ratified By the Court of Cassation with 45 / first civilians /1988 (unpublished).

[494] Muhammad Ali, *Civil and Judicial Protection for the Consumer of the Unfair Terms Comparative Study*, 1st ed. (Egypt: Center of Arabic Studies, 2018), http://sdr.shjlib.gov.ae:8080/pubs/alhimayat_almadaniat_walqadayiyat_lilmustahlik_min_alshurut/78/.

[495] Ali, Muhammad. *Civil and Judicial Protection for the Consumer of the Unfair Terms Comparative Study*. 1st ed. Egypt: Center of Arabic Studies, 2018. http://sdr.shjlib.gov.ae:8080/pubs/alhimayat_almadaniat_walqadayiyat_lilmustahlik_min_alshurut/78/.

[496] Article 139 of the ICC 1951 stated "If the contract in a part of it is null and void, then this part alone is null and void. As for the remainder of the contract, it remains valid as a separate contract, unless it becomes evident that the contract would not have taken place without the part that was void"

Interviewee R1 mentioned:

> *The court does not assess the fairness of the personal loan contract, it looks and checks the overall terms that satisfy the applied contract principles in terms of the consent of the parties, signatures, availability of consideration and written form contract. It just enforces the contract if it fulfils the previous requirement and obliges the parties to execute it. However, there is no idea of consumer protection in the Iraqi courts because the main consumer protection law is silent about the unfair terms in the personal loan contract without knowing the reason.*

Therefore, it could be said that the judiciary's function as a safeguard for consumers against the unreasonable provisions found in the typical personal loan contract is ineffectual. When they decide cases, the courts typically take an active part in the evolution of the nation's legal systems. In the interviews with the civil law judges, R3, they said that they have simply applied the statutory provisions of the Iraqi civil laws. Their job is to enforce the law when they adjudicate the cases that are brought to their courts. Judges should be empowered to control unfair terms and conditions. Such a measure is important to safeguard consumers when they enter into contract with a professional.[497]

R10 was in view that,

> *the presence of a competent consumer's court will enable an individual to sue the banks to assert the citizen's right to protect his own financial interests and ensure his rights. The existence of such an independent juridical authority will help to preserve the individual's right to a fair dealing with banks. The amendment of civil laws and other regulations from CBI for consumer protection cases could help also. Unfair terms in a loan contract case are adjudicated in civil court and as such civil laws are applied by the respective courts instead of consumer protection laws. This practice does not consolidate and strengthen the fundamental consumer protection principles for the good of the Iraqi borrower.*

[497] Salam Abul-Zahra and Ausama Shihab, "The Legal Conception for Estate Financing Contract (Comparative Study)," *Al-Mouhakiq Al-Hilly Journal for legal and political science* 7, no. 3 (2015): 177-200, https://www.iasj.net/iasj?func=article&aId=120586.

Due to the expense and length of court proceedings, many plaintiffs end up giving up their rights. This demonstrates the judiciary's shortcomings in Iraq with relation to matters affecting consumer protection.[498]

Due to the frequency of unjust terms as a result of the country's rapid economic development, the legislative authorities must intervene and adopt the principle of judicial review to safeguard the weaker party, even if doing so is against the principles of freedom of contract and authority of will. As long as the terms and conditions of the contracts are clear and unambiguous, and as long as they do not violate public morality or order, such a principle may prohibit the judiciary from scrutinizing the content of the contracts. Due to this restriction, judges cannot declare any of the contract's provisions unenforceable under the guise of upholding justice or attempting to strike a balance between the parties' respective duties.[499]

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It should be stressed, nonetheless, that the court has limited authority over a person's personality (the decision's consequences only apply to the parties to the current case). Such limitation implies that other contracts do not extend to them even if they fulfill the same condition that is considered unfair in the decision that the judiciary settled in a certain case. In addition, the judge cannot intervene unless the borrower wants to sue the other side.[500] It can be said that the legislative protection of the adhering party engaged in a personal loan contract has yet to reach the required level. The judge must seek out alternative means of protecting the borrower because it lacks

[498] Mahmoud Fayyad, "Consumer Protection from Unfair Terms in the Emirati Law: A Comparative Legal Study in Terms of the Directive (13/1993) and the Jurisprudences of the European Court of Justice," *Rights Journal* 14, no. 12 (2017): 215–71, https://journal.uob.edu.bh/bitstream/handle/123456789/3366/6.pdf?sequence=1&isAllowed=y.
[499] Zowba Samirah, "The New Legal Provisions for the Protection of the Contracted Consumer" (PhD diss., School of Law and Political Science, 2016), in Mizandz, https://www.mizandz.com/2018/12/pdf_658.html.
[500] Sabeeh, Umkalthoom. "Legal Controls for the Judge's Discretionary Power in the Adhesion Contract." *Route Educational and Social Science Journal* 5, no. 6 (2018): 868–91. https://www.researchgate.net/publication/332223107_aldwabt_alqanwnyt_lsltt_alqady_altqdyryt_fy_qwd_aladhan.

adequate legal protections to defend the weak party in a personal loan arrangement. Thus, the only things the judge can turn to are the rules of interpretation and the provisions for the exclusion of unfair terms and conditions.[501]

6.3 United Kingdom's Institutional Role

The progression of consumer credit reforms in the UK was also examined in this study. Policymakers have had to develop new regulations to safeguard consumers at a period of major regulatory reform. In what aspects of consumer financing are consumers interested? Consumer lending and the problems of social and economic exclusion are intertwined in the UK. Consumer credit is viewed by British politicians as a tool for combating marginalization. Consumer exclusion from modern credit markets, and consequently from the products and services for which credit access is made feasible, is extremely closely related.

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Early in the nineteenth century saw the beginning of consumer credit interest in the UK. During this time, the need for widespread credit reform grew to be seen as a legitimate and pressing problem. Parliamentary discussions, bills, and select committee/commission conclusions were the main sources of evidence supporting this interest. The major goal of this study is to provide readers a clear image of what lawmakers think about consumer credit, legislative change, and protecting consumers from unfair terms. Regarding the future course of Iraqi law, several suggestions are also put out.

[501] Ali, Muhammad. *Civil and Judicial Protection for the Consumer of the Unfair Terms Comparative Study*. 1st ed. Egypt: Center of Arabic Studies, 2018. http://sdr.shjlib.gov.ae:8080/pubs/alhimayat_almadaniat_walqadayiyat_lilmustahlik_min_alshurut/78/.

6.3.1 The Preliminary Governing Structure of the UK Legislative Reform for Consumer Credit

Governing framework passed through two distinct stages of theoretical belief. Specifically, "law and economics" and "law and society". These are very relevant to regulate consumer protection in the personal loan contract with banks. One may argue that, until recently, the "law and economics" theoretical framework had a significant impact on the legal and regulatory framework controlling the high-cost loan industry. It is noteworthy that neo liberal economic theory has had a major role in the regulation of the UK lending industry.[502] Neo-liberalism is "a theory of political economic practices that closely associates human wellbeing with the liberation of the individual's entrepreneurial freedoms and skills," as stated in the definition of the term. A nation that promotes private property rights, free commerce, and market freedom.[503]

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The consumer credit market in the UK witnessed considerable changes to its governance spirit in the late 1970s, among other financial sector divisions, and this marked the beginning of the significant influence of neo-liberal economic policies. The government at the time formed the Crowther Committee to look at how the consumer credit business was managed.[504] The research, which was published in 1971, made it quite clear that consumer credit would be governed by neo-liberalism. It said that the "correct policy is to assist the minority who unintentionally run into financial difficulties to manage their financial affairs more successfully rather than to impede their consumers' freedom of access to credit by administrative and legal

[502] Aldohni, Abdul Karim. "The UK New Regulatory Framework of High-Cost Short-Term Credit: Is There a Shift Towards a More '"Law and Society"' Based Approach?" *Journal of Consumer Policy* 40, no. 3 (2017): 321–45. https://doi.org/10.1111/j.1467-6478.2013.00633.x.
[503] Ipid
[504] Aldohni, Abdul Karim. "Is Ethical Finance the Answer to the Ills of the UK Financial Market? A Post-Crisis Analysis." *Journal of Business Ethics* 151, no. 1 (2018): 265–78. https://doi.org/10.1007/s10551-016-3269-5.

measures."[505] In this view, government intervention is limited to establishing the legal framework and guaranteeing its enforce-ability, leaving the market to redistribute property rights in line with supply and demand and price.[506]

It should be stressed that the Crowther Report sets the tone for the extent of State involvement envisaged in the consumer credit sector for many years to come. The article claims that "our basic position is that the state should interfere as little as possible with the customer's freedom to use his knowledge of the consumer credit market to the best of his abilities and in accordance with his assessment of what constitutes his best interests. People must determine what adds to their material welfare individually, which is a fundamental element of a free society.[507] Practically speaking, this means that the State should no longer be engaged in the distribution of credit; rather, customers and credit providers should manage this process.[508]

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Therefore, the CCA of 1974 reflected the neo liberal theory. The CCA 1974 should be emphasised as being relevant to all consumer credit types, including high-cost credit, of which a personal loan is one. The adoption of the Act, which granted the court power to intervene when a loan agreement is "extortionate," abolished the Money Lenders Act of 1900, which was later revised by the Money Lenders Act of 1927 to establish a statutory cap of 48% interest.[509]

[505] Crowther Report 1971, para 3.9.2.
[506] Aldohni, Abdul Karim. "Is Ethical Finance the Answer to the Ills of the UK Financial Market? A Post-Crisis Analysis." *Journal of Business Ethics* 151, no. 1 (2018): 265–78. https://doi.org/10.1007/s10551-016-3269-5.
[507] Crowther Report 1971, para 3.9.1
[508] Aldohni, Abdul Karim. "The UK New Regulatory Framework of High-Cost Short-Term Credit: Is There a Shift Towards a More '"Law and Society"' Based Approach?" *Journal of Consumer Policy* 40, no. 3 (2017): 321–45. https://doi.org/10.1111/j.1467-6478.2013.00633.x.
[509] (Consumer Credit Act 1974, s137–140)

A market where pricing is fully determined by market forces is also a product of the idea of a self-regulatory consumer credit market. This situation lasted in the UK market for high cost borrowing until January 2015, at which point lenders were free to charge absurdly high interest rates without being bound by the legislation in effect at the time. In contrast, the Office of Fair Trading (OFT) took the position that any enforced price limitation would have negative impacts on consumers and the market in its 2010 "Review of High-Cost Credit" despite the fact that many consultation respondents requested a cap on the price of credit (OFT 2010a, b).[510]

According to a long-held government opinion, the former Department of Trade and Industry (DTI) stated government concerns over the protection of low-income customers in its 2003 White Paper, "Fair, Clear, and Competitive: The Consumer Credit Market in the 21st Century." The White Paper did not focus primarily on the interest rates imposed by these loan arrangements since it was believed that interest rates were generally not a reason for concern. [511] Instead, other considerations including default pricing, the bare minimum of security, and a lack of clear information were brought up in the White Paper as problems.[512]

The "extortionate credit" bargain test, which may be used to dispute the charged interest rate as well as other components of the contract, superseded the 48% statutory interest rate maximum that had been in existence prior to the CCA 1974.

[510] "Banking Regulation in the UK: Overview, Practical Law." Accessed October 18, 2019. https://uk.practicallaw.thomsonreuters.com/w-008 0211?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[511] The justification provided by the industry, and clearly accepted by the Government, for charging an extortionately high-interest rate stemmed from the fundamental mechanism of pricing. This is simply because the price that was decided by the market factored the higher credit risk, which those lenders were exposed to when lending to less creditworthy consumers. This allowed their APR to reach as much as 4000% where high cost credit providers enjoyed high discretion in modelling credit risk and factoring it into their APR calculation.

[512] Brown, Sarah. *The Regulation of Consumer Credit: A Transatlantic Analysis*. UK: Edward Elgar Publishing, 2019, 2019. https://books.google.com.my/books?id=wQzADwAAQBAJ&dq=in+2003+the+DTI+in+its+White+Paper:+%22Fair,+Clear+and+Competitive:+The+Consumer+Credit+Market+in+the+21st+Century%22&source=gbs_navlinks_s.

Later, the effectiveness of the test as a defensive measure was questioned by the Government (DTI 2003, p. 52). As a result, sections 137 through 140 and the "extortionate credit" contract test were repealed and replaced with the "unfair relationship" test under sections 140A through 140C of the CCA 1974 in the CCA 2006, which updated the CCA1974.[513]

The principal credit agreement and all other related agreements will be evaluated using the new approach in assessing whether the Agreement is fair. Defined in Sections 140C (4-a, b, c) and (7-8) of the Consumer Credit Act of 1974. addressing the terms of these agreements, their enforcement, and any acts or omissions made by the creditor or on its behalf before to or during the establishment of the credit agreement or any related agreements in accordance with Sections 140A (1-a) and (1-b) of the CCA 1974.

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The fairness of these contracts was questioned due to the high interest rates imposed, and courts have assessed a number of credit agreements after the CCA 2006 changes went into effect, regardless of their varied places in the judicial hierarchy. With regard to determining whether the high interest rate would render the agreement unfair, the judges' decisions in these instances all had one thing in common: they largely focused on market conduct.[514]

It should be emphasized that while deciding whether the interest rate is appropriate, the court takes market practices into account. The Supreme Court's decision in Pelvin

[513] Cartwright, Peter. "The Vulnerable Consumer of Financial Services: Law, Policy and Regulation," nd.
[514] This can be seen in the High Court and the Court of Appeal decisions in Khodari v Al Tamimi [2009] EWCA Civ 1109, Barons Finance Ltd. v Lara Basirat Abeni Olubisi [2011] EWCA Civ 1461 and Robert Shaw v Nine Regions Limited [2009] EWHC 3514 (QB), and County Courts decisions in Nine Regions (t/a Logbook Loans) v Sadeer Bromley County Court, Case No: 8QT25415 and Nine Regions (t/a Logbook Loans) v Fateh Singh Leeds County Court, Claim No: 8QZ 16394.

Paragon Personal Finance Ltd., for example, highlighted this idea by stating that "the standard of commercial conduct may legitimately be influenced by the view that a court takes of the fairness or unfairness." Despite the fact that the fairness of the agreement is "a matter for the court, on which it must make its own assessment," the Supreme Court has established a balance between the importance of "the standard of commercial conduct" and the court's discretion in reaching that decision. One of the court's "wide range of concerns" will be the sophistication or shortcomings of the borrowers. The range of choices provided. The prior example demonstrated the relevance of the assumption of the "law and economics" theoretical frame due to its neo liberal base.[515] The "law and economics" theoretical framework is thus no longer the proper basis for the UK's expensive consumer credit regulation.

Throughout the aforementioned discussion on the Iraqi situation, the researcher comes out with the thought that the UK's preliminary governing Structure of the UK legislative reform for consumer credit in the first stage i.e. law and economics is similar to Iraqis current one. In Iraq, even though legislating CPA 2010 and issuing consumer protection guide by the CBI, the researcher in view that the main base represented the law and economics. This may serve as a warning to the Iraqi regulator that this framework is no longer a suitable basis for regulating consumer credit for personal loans.

While providing a unique perspective on how law and economy interact, the "law and society" theoretical framework investigates the interaction between law and

[515] Aldohni, Abdul Karim. "The UK New Regulatory Framework of High-Cost Short-Term Credit: Is There a Shift Towards a More '"Law and Society"' Based Approach?" *Journal of Consumer Policy* 40, no. 3 (2017): 321–45. https://doi.org/10.1111/j.1467-6478.2013.00633.x.

economics from a sociological perspective. As a result, society not only influences this connection significantly but also, in certain cases, exceeds law and economics. As was previously indicated in this study, consumers of personal loan contracts traditionally have been the most vulnerable elements of society with a poor negotiation position. This credit market model makes the assumption that society may benefit from the presumed state's authority by implementing moral laws that constrain people's greed and the pursuit of material prosperity.[516]

By implementing a variety of regulatory protection measures and restricting the cost of credit, the Financial Conduct Authority (FCA) ended the fundamental pattern of the "law and economics" paradigm, namely self-regulation and market rules, in the context of credit agreements. This regulatory intervention is essential to creating the credit market since it is for once focused on safeguarding the social component of the market. Numerous steps have been attempted to effect this change since the FCA assumed its role as consumer credit regulation in April 2014. Make sure the obligation for creditworthiness evaluation can be enforced first. It is now a component of the FCA's Handbook's legally obligatory regulations. CONC 5.2.1R (1) states that "the firm shall conduct the creditworthiness assessment prior to entering into a credit agreement.

However, more importantly, the FCA regulations require credit agreement providers to consider the harm the agreement would do to the client's financial status (CONC5.2.1R (2-a)). For the purpose of safeguarding the accuracy of the creditworthiness assessment, the FCA has passed new restrictions. Credit agreement

[516] Cartwright, Peter. "Understanding and Protecting Vulnerable Financial Consumers." *Journal of Consumer Policy* 38, no. 2 (2015): 119_138. http://www.consumerfocus.org.uk/topic/vulnerable-consumers.

providers "must establish and implement clear and effective policies and procedures" (CONC 5.3.2R) in order to conduct a reasonable creditworthiness assessment.

Second, the FCA's price cap marks a significant divergence from the "law and economics" theoretical framework and brings the credit market that much nearer to becoming ingrained in society. This is because, as was previously noted, one need for an embedded credit market is governmental participation that recognizes the importance of defending the economic interests contained inside the market while also preparing to defend more expansive social interests beyond the market.[517]

By establishing the price cap, the FCA has shown genuine concern for the non-economic. Additionally, it is clear that the FCA's price restriction is an illustration of a government action intended to influence the financial conduct of HCSTC providers in order to support a more stable society. The welfare of the borrowers, demonstrating that the programme has a larger societal goal. Lenders are required to "treat customers in default or in arrears difficulties with forbearance and due consideration," according to a clause in Chapter 7 of the FCA's Consumer Credit Sourcebook (CONC 7.3.4R), which acts as a check on this.

Banking regulators must establish rules requiring arm's-length agreements and effective monitoring of such credit extensions when banks lend to linked businesses and persons in order to prevent abuses related to lending. The banks must

[517] Committee, Great Britain: Parliament: House of Commons: Treasury. *Financial Conduct Authority : Twenty-Sixth Report of Session 2010-2012*. Britain: The Stationery Office, 2012, 2012. https://books.google.com.my/books?id=4-NlDFqrxbAC&dq=The+intervention+of+FCA+can+be+made+on+an+individual+basis+or+through+the+application+of+a+thematic+work&source=gbs_navlinks_s.

additionally guarantee that additional suitable measures are implemented to manage or lessen the risks.[518]

The terms and conditions of such credits must not be more favourable than if the credit were granted to unrelated borrowers in similar situations, and rigorous lending restrictions are the easiest ways to put these controls into place. In the right situations, supervisors should have the power to (1) impose strict restrictions on certain kinds of such loans, (2) subtract such lending from capital when determining capital adequacy, or (3) mandate collateralization [519]these loans, The bank's board of directors should approve any transactions with connected parties that present particular dangers to the institution, notify them to the supervisors, or forbid them completely. In some cases, integrated banking organisation supervision can help identify and address lending-related issues.[520]

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6.3.2 Competition Markets Authority

Recently, the right to bring a lawsuit was granted to the Competition Markets right (CMA), Trading Standards Services, and other applicable authorities in order to stop the use of unfair terms and notices, contraventions of the transparency requirement, and the blacklisting of persons. If necessary, an injunction from the court may be requested to effectuate this prevention. According to the Enterprise Act of 2002, if a corporation is using, intending to use, or pushing language that seems to breach the

[518] Bob Penn, Allen, and Overy, "Banking Regulation in the UK: Overview," *Practical Law Country*, no. Q&A (2018), https://uk.practicallaw.thomsonreuters.com/w-008-0211?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[519] George Walker, *International Banking Regulation:Law, Policy and Practice*, Illustrate (Kluwer Law International, 2001), https://books.google.com.my/books?id=L0E0o7czaH0C&pg=PA222&lpg=PA222&dq="An+Approach+to+the+Regulation+of+Bank+Holding+Companies."%2B+%22UNITED+KINGDOM%22&source=bl&ots=gtZMCjugHc&sig=ACfU3U0Cx3VMny-YJ3Q88b4qq3jrUW_6Aw&hl=en&sa=X&ved=2ahUKEwitiMi6p47lAhWD.

[520] Committee on the Global Financial System, *Committee on the Global Financial System Structural Changes in Banking after the Crisis Report Prepared by a Working Group Established by the Committee on the Global Financial System*, 2018, www.bis.org.

transparency requirement, is unfair, or is banned, the CMA or another listed authority may ask the court to impose an injunction. Clauses addressing language having a similar meaning or effect may be included in the court order.[521]

The Act may oblige retailers to provide the details required to, for instance, ascertain if unfair terms and notices are being used or whether a person is adhering to an undertaking or injunction. If a corporation gives a sufficient commitment to stop using the wordings or to change them, provided that the agreed-upon course of action is followed, court actions won't be necessary. Part 8 of the Enterprise Act of 2002 gives the CMA and other enforcement authorities separate jurisdiction to investigate violations of consumer law generally, including the Act, and to demand undertakings or enforcement measures. When, for instance, problems develop under several distinct consumer laws, the use of these authorities may be justified[522]

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An undertaking or enforcement order established under the Enterprise Act may, in some situations, contain measures that give remedy for customers who have incurred losses (which may include monetary compensation). Additionally, each individual consumer has legal rights under the Act, independent of the jurisdiction of the CMA or other authorities. Customers have the right to object to any unfair or illegal language used by a business. They have the option to take part in or oppose legal proceedings in court, if necessary.

[521] Competition antitrust and trade, "Increased Consumer Protection in the UK: CMA Proposed Reforms to Existing Competition and Consumer Protection Regimes," Osborne Clarke, 2019, https://www.osborneclarke.com/insights/increased-consumer-protection-uk-cma-proposed-reforms-existing-competition-consumer-protection-regimes/.

[522] Bryan Cave, "CMA Reforms - A Consumer Focus," Lexology, 2019, https://www.lexology.com/library/detail.aspx?g=dc2a863a-8247-4c08-aabc-493a210a933b.

Accordingly,[523] A number of measures have been put into place by organizations in the UK to assist the governments, including the provision of general standards that can serve as a foundation for codified and unified laws that guarantee equal protection to all consumers. Given this, it is imperative for the government to create and execute laws to guarantee that the market functions on the basis of informational openness, consistency of implementation instruments, equality of interests between consumers and businesses, and enough redress mechanisms.[524]

Similar to what happened in the UK when the government announced the organizations that will be handling the consumer protection duties, for example giving the new Competition Markets Authority (CMA) and Trading Standards responsibilities for enforcing consumer laws. While the CMA is in charge of enforcing unfair terms (such as unfair ticket terms and conditions), Trading Standards is responsible for the prevention of unfair trading practices (such as those in advertising, marketing, and selling practices).[525]

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6.3.3 The Financial Conduct Authority

Section 6(1) (1C) of the Financial Services Act of 2012, which set the Financial Conduct Authority's goal for customer protection as ensuring an adequate degree of protection, continues the discussion of distinct consumers. In order to accomplish this, the FCA must take into account a wide range of specific factors, including different degrees of product risk (a), changes in customer risk depending on their

[523] Christine Riefa, "Codification: The Future of English Consumer Law," *Brunel University London*, 2017, https://www.academia.edu/12787579/Codification_the_Future_of_English_Consumer_Law?auto=download.
[524] Cartwright, Peter. "Understanding and Protecting Vulnerable Financial Consumers." *Journal of Consumer Policy* 38, no. 2 (2015): 119_138. http://www.consumerfocus.org.uk/topic/vulnerable-consumers.
[525] Robin Kingham and pupil, "The Consumer Rights Act 2015: A Summary of Key Changes," Gough Square Chambers (2015): 1, accessed November 25, 2016, https://goughsq.co.uk/wp-content/uploads/2015/04/Consumer-Rights-Act-2015-Summary.pdf.

knowledge, experience, and expectations of various products (b), as well as different information and advice requirements (c). Additionally, while keeping the general idea of consumer accountability (d), the need that people get an acceptable, contextualized level of care acknowledges the provider's responsibility (e). Understanding what this range of differentiating factors may mean for the FCA's approach to consumer populations requires understanding that the consumer protection objective sits alongside operational goals pertaining to the integrity of the UK financial system and the promotion of effective competition in the interests of consumers on the markets for regulated financial services and investment services.

The competition purpose also relates to the needs of various consumers who use or may use those services, including their need for information that will enable them to make informed decisions, in accordance with section 6(1)(1E)(2)(a). Bank lending to affiliated firms and individuals must be done on an arm's-length basis and be strictly governed by the regulations established by banking regulators in order to prevent lending abuses. The bank must further take the required steps to reduce or restrict the risks.[526]

The easiest way to implement these limitations is to demand that the terms and conditions of such credits not be more lenient than if credits were granted to unrelated borrowers under comparable conditions. Setting severe restrictions on such financing is yet another control mechanism. In the right situations, supervisors should have the power to go farther and impose strict restrictions on certain types of such loans, subtract such lending from capital when determining capital adequacy,

[526] Bob Penn, Allen, and Overy, "Banking Regulation in the UK: Overview," *Practical Law Country*, no. Q&A (2018), https://uk.practicallaw.thomsonreuters.com/w-008-0211?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

and mandate collateralize. [527] of such loans. Transactions involving linked parties that provide particular risks to the bank should either be prohibited, subject to board of director approval, or disclosed to supervisors. In some cases, identifying and reducing lending-related issues can be done by consolidating the supervision of banking organizations.[528]

Thanks to the Financial Services Act of 2012, which substantially overhauled the UK's financial regulatory architecture, consumer credit laws are now under the jurisdiction of the Financial Conduct Authority (FCA). This progression has led to a partial replacement of the Consumer Credit Act of 1974 (CCA), as well as the establishment of a regulatory framework backed by the Financial Services and Markets Act of 2000 (FSMA). As a result, a few specifications are now listed in the Consumer Credit Sourcebook, sometimes known as "CONC." [529]

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At this time, the CONC is intended to supplement the controls found in the CCA rather than totally replace it. It offers a chance to review the existing regulations and evaluate the changes made by the Consumer Credit Act of 2006 (2006 Act). The CONC now contains many of the procedural and informational requirements that were previously included in the CCA, but some controls and sanctions will be subject to reconsideration in the future. One such punishment is the unfair credit connection test as described by 140A-C. The court is given considerable discretion

[527] George Walker, *International Banking Regulation:Law, Policy and Practice*, Illustrate (Kluwer Law International, 2001), https://books.google.com.my/books?id=L0E0o7czaH0C&pg=PA222&lpg=PA222&dq="An+Approach+to+the+Regulation+of+Bank+Holding+Companies."%2B+%22UNITED+KINGDOM%22&source=bl&ots=gtZMCjugHc&sig=ACfU3U0Cx3VMny-YJ3Q88b4qq3jrUW_6Aw&hl=en&sa=X&ved=2ahUKEwitiMi6p47lAhWD.

[528] Committee on the Global Financial System, *Committee on the Global Financial System Structural Changes in Banking after the Crisis Report Prepared by a Working Group Established by the Committee on the Global Financial System*, 2018, www.bis.org.

[529] Handbook, FCA. "Consumer Credit Sourcebook Pre-Contractual Requirements." UK, 2019. www.handbook.fca.org.uk.

under Section 140B to modify a credit arrangement's terms or even to void the whole thing.[530]

Regarding the borrowers, the FCA contended that a sizable portion of the UK's population makes up the consumer credit client base. Consumers are more likely to face financial troubles compared to other financial services sectors. They might also have a harder time standing up for themselves. They might not be aware that a breach has occurred, have a legitimate grievance, or be unsure of their rights. Even in cases where individuals are aware of a problem, they could be hesitant to file a complaint or request compensation. As a result, businesses might make fewer efforts to ensure compliance.[531]

In response to the Committee's Twenty-Ninth Report, the Financial Conduct Authority addressed how complaints about unfair terms in credit agreements were handled. [532]in 2019 stated that,

> *When specifically considering terms and conditions, the unfair terms legislation requires contract terms to be written in plain and intelligible language. Where we receive complaints or where we proactively identify concerns about the clarity (and indeed fairness) of contract terms, we can use our powers under the unfair terms legislation to secure an undertaking from a firm that it amends or removes the term. This also raises awareness of our views for other firms. We have accepted and published a number of undertakings under the unfair terms' legislation on both the fairness and transparency of contract terms. We will continue to use these powers where appropriate.*

[530] Brown, Sarah. "Consumer Credit Relationships - Protection, Self-Interest/Reliance and Dilemmas in the Fight against Unfairness: The Unfair Credit Relationship Test and the Underlying Rationale of Consumer Credit Law." *Legal Studies* 36, no. 2 (2016): 230–57. https://doi.org/10.1111/lest.12100.
[531] Cartwright, Peter. "Understanding and Protecting Vulnerable Financial Consumers." *Journal of Consumer Policy* 38, no. 2 (2015): 119_138. http://www.consumerfocus.org.uk/topic/vulnerable-consumers.
[532] Andrew Bailey. "Consumers' Access to Financial Services: Financial Conduct Authority Response to the Committee's Twenty-Ninth Report." London, 2019. https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/2423/242302.htm.

In contrast to Iraq, most national regulations and practices make it difficult for consumers to approach the courts to protect their rights to equal treatment and bargaining power with a bank. Before a resolution is achieved, a legal case could last for years. The legal fees are also very significant, and if the challenge is unsuccessful, there is a chance that the defendant's legal fees will have to be covered. The main factors preventing potential plaintiffs from filing lawsuits are those stated above. Some national courts are unable or unwilling to require government agencies and institutions to take the necessary steps to lessen the issues brought on by the discriminatory provisions of the typical loan contract. As a result, the Iraqi judiciary is unable to develop efficient legal remedies for problems involving consumer protection.

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6.4 Conclusion

The consumer protection movements of creating a more efficient banking system is associated with and has probably been fostered by standard forms developments. The technical developments have eroded the effectiveness of the traditional regulatory constraints on competition in the banking industry. Yet, whatever the cause, the existence of the movement seems undeniable. The current antiquated techniques being used are the dealing methods, the administrative staff’s tepid response to modern changes, the absence of a suitable strategy for dealing with customers, and the weak marketing traditional banking products have made the banking and administrative systems unable to keep pace with the new banking systems. The indicators of a weak consumer protection in a bank would include a large quantity of high value doubtful debts (which affects financial stability) and government banks having a high percentage of credit defaults.

The CBI's mechanism to protect borrowers are to a certain extent inadequate to drive banks to adhere to it. The system should follow the policies put in place by the UK government, which calls for the establishment of a special agency to oversee and regulate personal loan contracts in order to guarantee that they don't include any discriminatory terms or conditions. The specialized authority's function promotes equality among the contractual parties during negotiations. The role also enables consumers to make the right choices when taking a personal loan. Banks are obliged to follow the compulsory rules that obligate them to inform ~~and~~ educate the consumers on the loan's terms and conditions as well as the duration of the loan. Therefore, the consumer, knowing that he/she is fully protected at all stages of the contract, can confidently sign the personal loan contract.

Findings from this study suggest that the structure of the Iraqi civil law grants very little independence to the judiciary, including its low level of authority, to scrutinize an executive authority's actions to provide minimal protection to consumers against unfair terms in contracts. Judges in Iraq's civil courts have extremely limited discretion since their independence is constrained by extensive, specific statutes and norms. As a result, because adjustments may only be made intermittently through legislation, the evolution of the credit protection law system may be overly inflexible.

The legal system of Iraq is based on civil law, and the legislature has more authority over the recruitment, selection, and tenure of judges as well as other legal institutions. As a result, the institutional structure lacks a mechanism for managing complaints, and dispute resolution is less effective at shielding individual rights from

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the bank's grasp. In reality, Iraq's legal system must take notes from the UK's model institutional framework in order to safeguard bank loan consumers against unfair terms in their contracts. The aim is to enact a regular and comprehensive framework range from policy, rules, and legal regulations, which is possible by intention, dedication, supervision, and execution of the government.

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CHAPTER SEVEN

DISCUSSION AND RECOMMENDATIONS

7.1 Introduction

The study and recommendations for bolstering institutional roles and consumer protection legislation in Iraq against misleading terms in personal loan agreements are summarised in this chapter. At the conclusion of the chapter, recommendations for more research are offered.

7.2 Issues of the Legal Framework

In order to make improvements to the Iraqi legislation on unfair terms, the rules, doctrines, and principles of Iraqi law that are pertinent to unjust contract terms were examined in this study. In order to do this, a comparative legal study comparing UK and Iraqi laws was done. The Iraqi banks have been persuaded to put unjust terms in the typical form of a banking contract since the customers of personal loans there lack the means and leverage to analyse, negotiate, and prevent the implementation of any unfair terms. A one-sided conventional banking contract serves as proof of this misuse of power.

The Iraqi adhesion contracts have drawn criticism for reducing the power of the weaker party (banking consumers) and giving Iraqi banks more freedom to take advantage of them. Being in a stronger position to negotiate, Iraqi banks would typically craft provisions that favoured them to the point of excluding or restricting their obligation and disregarding the interests of their customers.

To promote fair dealing and maintain the public's confidence and trust in the banking sector, customers must be protected from any unfair contract terms in personal loan contracts. Without the assistance and cooperation of banking customers[533], the stability of the Iraqi banking system will undoubtedly deteriorate over time. This study discovered that the typical loan agreement between a consumer, a borrower, and a bank has provisions for many of the legal issues related to consumer protection against unfair terms. This study's objective is to evaluate the efficiency of the institutions and laws in Iraq that deal with consumer protection in the financial sector.

7.3 Issue 1: The Legal Rules of Consumer Protection against Unfair Terms in a Personal Loan Contract

This section is a study of the legal problems as they relate to the Iraqi legal system. The problems were established by contrasting the UK's consumer protection legislation with those in Iraq regarding unfair terms in personal loan contracts.

The dominance of the old principles in the realm of standard form contracts

Organizations that enter into personal loan contracts are subject to the basic ICC regulations that apply to regular contracts. The following legal elements of a contract serve as the foundation for these regulations: authority of will, pacta sunt servanda (Latin for "agreements must be kept"), free will, and adhesion contract, the latter of which is still largely in use. Thus, if a normal contract is to be concluded between two parties at one legal status and based on two free wills in the choice of what is to be concluded and are consistent with all the terms and conditions listed in the

[533] Noor Mahinar, Hashimah, and Siti Salwani, "Consumer Rights Act 2015 (United Kingdom): Is It a Good Model in Protecting Banking Consumers from Unfair Terms in Islamic Banking Consumer Contracts in Malaysia?"

contract. Then, circumstances may force people to enter into a certain type of contract without the freedom of choice.

According to the ICC 1951, once a contract is valid, it becomes enforceable, and the parties must comply by it. Unless all parties agree to do so or for a legal basis, the contract is the law of the parties and cannot be altered, cancelled, or exempted. The contractor is expected to do their duty in accordance with Article 145 of the Civil Code regardless of the payment specified in the contract. According to Article 146/1, once a contract is signed and executed, it becomes legally binding and cannot be terminated or amended by either party without the other party's approval or in accordance with applicable law.

There are no regulations governing consumer protection from unfair terms in conventional loan contracts.

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In general terms, the ICC has two rules that control unfair terms in standard form contracts: 166 and 167. These provisions give a judge a discretionary power based on justice and are discussed in the judicial role.

Regarding the defence of consumers against unfair terms in personal loan agreements, the purpose of the CPL enacted in 2010 is to provide protection to the Iraqi consumers. This law sets the definitions of *consumer*, *supplier*, and *professional and consumer protection*. However, the CPL is not enforceable. Additionally, it is not subject to the same regulations that protect consumers from abusive terms in regular loan contracts.

Inadequate safeguards against unfair terms *in a personal loan agreement*

The terms considered unjust in a typical contract, and in a personal loan contract in particular, are not identified by the Iraqi ICC or CPL. In addition, our analysis revealed numerous instances of unfair terms in the consumer contracts in the earlier chapters. As a result, customers who were harmed by unjust provisions in a personal loan contract are urging Iraqi lawmakers to take proactive action in accordance with global trends. The Iraqi laws, particularly on personal loans, also appear to be not sufficiently amended and developed to keep up with the significant development in the market.

The Iraqi legal system also seems to demonstrate legislative carelessness in terms of protecting consumers. When its rules are implemented, the borrower should be given precedence, and the rights and duties of the parties supported by this research should be balanced. As a result, the legislature's responsibility to safeguard borrowers' interests is insufficient.

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7.3.1 Recommendations

Based on the findings, it is argued that the ICC provisions could be used at the time of issuing the ICC to suit the freedom of contract principles, which denote (1) negotiating the terms of the contract is permissible between the parties; (2) that they have an equal bargaining power; (3) that the economic situation is fair; and (4) that the stable dealing is limited and the time is wide to do the negotiation. In order to determine the parties to such an agreement, it is necessary to include the definition of the standard form contract as well as all other standard contracts with consumers. Find the terms and conditions provisions in the standard form contracts, such as the

one for the personal loan. The comparison results led to the following recommendations being put forward:

Amendment to the concept of the adhesion contract

The conclusions imply that a request be made to the Iraqi legislative to widen the definition of an adhesion contract and rename it as a standard form contract in order to include customers of personal loans in the protection provided by the provision. The following constitutes the suggested definition of "standard form contract":

'Standard form contract that obliges consumer as the weaker party in the contract to terms and conditions that prepared in advance from the stronger party (bank) without prior negotiations exploiting the necessity and urgency of needs of a consumer to the service or money that monopolized from the stronger party."

In addition, the study proposes that the ICC be amended by adding the definition of a personal loan contract as follows:

A refers to giving the borrower access to a certain amount of money in order to help them with their urgent financial needs. As insurance for the loan contract and to benefit from the bank's loan service grant, the borrower pledges to return the equivalent he has received plus a specified percentage of interest.

Identifying unfair terms in a personal loan agreement

According to a fairness test, the phrase is more likely to be legal if it is worded and presented in a way that respects customers' legitimate interests. As a result, the CPL should include the fairness test of a standard form personal loan contract. By applying some type of uniform appraisal to the entire contract as well as to its clauses and circumstances, which may be unjust to borrowers. The gray and blacklists represent the tested examples and ideal productions of such an evaluation. Such a procedure can be beneficial for consumers and judges because it can prevent a misunderstanding of any unfair term in a personal loan contract. Thus, the research

recommends adding an explanation to Article 167 of ICC. Additionally, the Consumer Protection Act of 2010 (CPL 2010), the Consumer Protection Board, and associated inspection committees must be enforced for the protection of consumers to not fall under the general Civil Code of 1951 rules, which may not shield them from challenging prosecution and complicated investigations. Also, the existence of the suspended law means that the bank is not bound by all the obligations required by law in the interest of the consumer.

7.4 Issue 2: Institutional Role of Consumer Protection Against Unfair Terms in a Personal Loan Contract

The information on the numerous concerns connected to the institutional framework is presented in this part. This study discovered a gap in the institution's ability to protect personal loan contract clients in Iraq. For instance, the Central Bank of Iraq (CBI) lacks a sound plan for enforcing the regulations in the consumer protection guide. The CBI also allows interest rates to be determined by the banks. Although the institution emphasizes transparency in dealing with customers, it does not attend to the consumers of a loan contract, who are considered vulnerable when they contract with a bank.

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7.4.1 Weakness of the role of the Iraqi central bank

The Iraqi banking system, after a long experience of war and instability, has become one of the sovereign institutions of the state. The banking system is an important reference for measuring the development and progress of an economic development, not only in Iraq but also throughout the world. Because banks are the most important financial institutions contributing to the development of economic and commercial

operations, they are the financial institutions involved in raising the level of investment and trade operations in any country.

The Iraqi Constitution designates financial regulation as falling under sole federal jurisdiction. There is a significant federal legislation in this area as a result. According to Banking Law No. 94, the CBI is the only government body in responsibility of overseeing the banking sector. Therefore, the CBI is the principal institution that directly influences how the banking market behaves. Striking a balance between the rights and duties of service providers and customers is the institution's main strategy.

However, the law of the Central Bank does not distinguish between private banks and government banks in that both must comply with the same regulations and rules of the CBI law. There are no specific details about the nature of the work of a bank; each bank shall apply a specific system through a set of rules of standard forms to provide a general arrangement of the relationship between the bank and its clients. These forms include the obligations of each party in the relationship and the identification of certain parts left to be negotiated according to the nature of the banking process. The remainder, if not most of the terms and conditions, are general and formulated in advance; they are free of any discussion or negotiation as in the contract of a personal loan.

The Central Bank issues a guide to protect the customers of banks in accordance with the international principle of transparency[534] in financial and banking transactions

[534] CBI reached up to 11% in the international measures that established in 2015 to encourage banks to share and share their monetary policies.

provided by banks to various customers and workers to provide an appropriate environment to preserve the rights of customers in a balanced relationship. The mechanisms of the CBI which protect borrowers to some extent, lack the ingredient to enforce them to compulsory rules adhered by banks. The function of the specialist authority permits equality of the contract parties during negotiation, much as the application made by the UK government (via a special agency (FCA) in charge of supervision and control of the unjust provisions in the personal loan contract). It enables consumers to make the right choices from the personal loans offered due to the compulsory rules on the banks that obligate them to inform, educate, on period to choose and control standards and terms.

Therefore, the consumer is confident with the full protection in all stages of the contract. Additionally, the UK's legal system protects creditors' interests better than Iraqi law. Due to the great amount of protection provided by the UK's regulatory structure in the area of credit contracts, British law is unrivalled in terms of overall creditor protection. Consumer credit regulation is a topic that periodically comes to the forefront of UK government policy.

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7.4.3 Recommendations on the role the CBI

In terms of institutional role, it could be clearly seen that both Iraq and the UK have similar authority according to the law to protect the consumers of personal loan. The UK, however, has advanced measures due to continuous supervision and development of the rules in response to consumer claims. In addition to the enforcement power, the FCA has to issue decisions and penalties on the banks. The FCA also controls the terms of the standard form and issues special interest rates for

personal loan contracts. Based on the findings, it is suggested that the UK system be exemplified in terms of supervision, controlling, enforcement, and claims settlements in a separate specialized tribunal applying the rules of consumer protection law and CBI regulations.

In addition, it would be better if the Iraqi government created special laws that addressed circumstances when a consumer has a right to compensation for losses in addition to the fundamental civil law rules. The legitimacy of contracts that exclude the supplier from the CPL's responsibilities will also be addressed. It is suggested that CBI advise regulated banks by:

1. Describing the circumstances under which and the manner in which the CBI consumer protection from unfair terms oversight would execute certain legal authority (mainly the Consumer Protection Law). Additionally, it is advised that the CPL mentioned provisions (which increase the CBI or specialized agency) be added to the personal loan contract in order to build a mechanism for controlling the calculation of the interest rate. As was highlighted in relation to the UK's system, the CCA unilaterally emphasizes and states the CCD respecting variation clauses in the FCA guidance (CONC).

2. Explaining how the above-mentioned supervision interprets the law.

3. Defining the guiding principles of the supervisory approach. The CBI may supervise the standard forms for personal loan contract that are provided by Iraqi banks.

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4. Providing helpful advice (for instance, outlining the processes of a procedure, like applying for a licence, or providing real-world examples of how regulated organizations could choose to comply with their requirements).

5. Providing customers with information about their rights and the means to exercise those rights through holding lectures, seminars, workshops, and television programme.

7.5 Issue 3: Complains handling and dispute settlement

Limitation of regulating the judge's discretionary power

In the Iraqi Civil Code 1951, there is a general provision which states:

" In the event that custom cannot be followed, a judge will make a ruling in conformity with Islamic Shari'a. The judge will use equitable principles in their absence.[535] ,and the deals of adhesion contract in the Article 167 [537]" contract and mentions that where unfair terms exist in such a contract, the court will judge against such unfairness in accordance with its principles of fairness and justice."

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Compared with the UK legal system, the research found that the UK lastly parked to give court wide discretionary power. According to the CCA, when a court finds an unfair relationship, it has the authority to "re-open" the credit agreement, make adjustments, discharge any obligations under it, order the borrower to repay his money, cancel any security provided by the borrower or return it to him, cancel any interest requested by the lender or reduce it, or make any other requests the court deems necessary to address the unfair relationship.

[535] ICC 1951 (Art. 1, par. 2)

However, difference can be noted in that the UK has a special financial ombudsman service to handle consumer credit complaints. Its power is extended by the CCA (2006 Act amendment), along with a grey and blacklists which can assist judges in making the right judgment.

Limitation of principles on the judge's authority

Although a court is allowed to decide how to re balance a contract by removing or changing its unjust terms and conditions, this decision must be made in accordance with the legal guidelines. The majority of laws now permit judges, in the event that terms are present, to implement the idea of adhesion contracts by determining the economic balance of a contract. In this situation, the judge will amend or remove any unfair term in an adhesion contract that can cause inequality in bargaining power and lead to the lifting of fatigue on the weaker party. In this case the law authorizes the judge to go beyond the limits of his or her normal task of interpretation and allows him/her to amend the adhesion contract.

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According to the study, this approach is deemed insufficient for handling the unfair terms in a personal loan contract since the unjust terms in an adhesion contract typically have the following features:

1- The unfairness of using an economic superiority, in which one of the parties possesses economic superiority and monopoly of service or commodity, thus unilaterally enabling him or her to set the terms of the contract. Monopolization means the ability of a professional to enforce the terms of the contract with certainty that there is no competitor.

2- The subject of the contract must be a commodity or service that the consumer contractor cannot dispense with, such as water, electricity, transport, and other goods and services that cannot be provided by each person himself and therefore be monopolized by a particular person or institution.

3- The offer must be issued to the public in the form of generality and peranence. Often the offer will be issued in a pre-prepared written form. Only the other contractor will have the right to sign without discussion.

4- The offer is produced in a standard form and accepted as a whole or rejected and is often in a printed form characterized by accuracy and complexity. The form usually includes terms that benefit the interest of the offeror; some terms often compensate the potential defaults of the offeror party, while others exempt the offeror from its contractual liability.

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While the lending contract is not mentioned with examples of an adhesion contract (which creates ambiguity about considering the contract of the personal loan as an adhesion contract and not because the lending service is no longer a monopoly of a bank or a particular entity), there are many competing banks that give personal loans with attractive offers. Hence, the monopoly element has been removed from this contract. The requirements of the Civil Code and the Consumer Protection Law do not organize it in detail, despite its significance in supplying the consumer with a specific amount of money and its relevance to society.

Based on the argument above, the researcher emphasizes that such contracts then include unfair terms and conditions cannot be tolerated. The terms cause contractual

imbalance hence a significant inequality between contractors in terms of legal status. Either by taking advantage from its economic status, such as in the case of personal loans contracts or exploited the need of the borrower and his desire for money, then bank imposed unfair terms and conditions that make the borrower at the mercy of the bank.

It can be said that the legislative protection of the adhering party engaged in a personal loan contract has not yet reached the required level; it remains with the judiciary. The judiciary may not find sufficient legal provisions that can facilitate him or her intervention to protect the weak party in a personal loan standard form contract. Such a shortcoming may force him or her to take other measures to achieve such protection. He or she may rely on the exclusion of unreasonable terms and conditions as well as the principles of interpretation.

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The liberal civil requirements that a contract is equivalent to the law and that they are founded on the application of the autonomy of will concept and the pacta sunt servanda principle are widely recognized. As long as the conditions are not against the law or morals, and as long as the contract and its terms are clear, these principles forbid the court from becoming involved to evaluate the deal.

The research also found that developed countries like the UK is departed from the old principles found to be inadequate for solving a creditor's issues in his or her loan contract with a bank. The inequality of the power to bargain between the creditor and the lender is the key aim of regulating unfair contract terms. The idea was that relative to the bank, customers were in a weaker negotiating position. Customers

have found it challenging to negotiate when terms are presented in advance by banks or to have an influence on the terms' substance due to a weakness in the earlier principles.

Borrower's protection in a personal loan contract

The study also found that the Iraqi Civil Courts are used to resort to the general rules of ICC 1951 particularly the provisions of adhesion contracts, default of consent (Error, Fraud, and Duress), and coercion considering it as basic principles to protect the consumer. The previous rules applied when a contract is concluding between respective parties understand their obligations and rights from the agreement after negotiations over the terms and conditions. It is asserted that consumers of personal loan contracts require unique regulations to handle the situations and risks that they face while dealing with a bank. There are currently no specific laws in Iraq that serve to safeguard their interests.

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Exemption of Contractual liability

The legal experts' and analysts' most important finding is that the ICC permits parties to be released from their contractual obligations. The civil law regulations governing contractual responsibility are not a matter of public order in Iraq. The parties to the contract may agree to amend their terms in order to relieve the debtor of its obligation since the contract was originally a by-product of the will, and the will has the ability to exempt the responsibility provisions originating from the contract under specific circumstances.

The ICC's rules on contract freedom served to worsen the problem of uneven negotiating power between the parties to a personal loan contract. The study found that the development of the standard form of contract, particularly the personal loan contract, which demands a particular legal and institutional role in resolving the unjust terms included in the agreement, is at odds with the freedom of contract. The discriminatory clauses included in consumer personal loan contracts and the possible repercussions they may have on the borrower the contract's weaker party are unknown to Iraqi law.

In conclusion, courts have overruled the ICC's rules and are therefore unable to help provide consumer protection from a personal loan contract's unjust condition. Judges must abide by the law because of the civil law system, and the lack of legislation has limited the function of judges.

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7.5.1 Recommendations in terms of judicial role

1. Regarding to the Limitation of regulating the judge's discretionary power on the basis of the debate above, it is recommended that the Iraqi legislature change the ICC by designating a section to rule the deletion of unjust provisions in a personal loan contract. Grey and blacklists might make it easier for judges and the court to make the proper decision when dealing with unjust provisions in a personal loan arrangement.

Providing the legal standards of conduct for directors and officials might be considered as regulating the regulations to safeguard bank creditors. If these requirements are broken, there may be civil penalties, most frequently a civil

liability, as well as criminal fines and administrative penalties. Which of these enforcement tactics a jurisdiction would employ depends on a number of factors, including legislative precedents and whether criminal fines are considered a regular enforcement alternative or are only employed for seriously unethical actions. Consumer protection measures should be detailed in the Consumer Protection Act 2010 to ensure that a consumer has access to the right of compensation in the fastest way and ensured ways away from the complex procedures of the claim under general rules. The present research, therefore, calls for a specialized court in an appeal area that hears consumer protection claims administrated by a judge with competence and experience in consumer protection cases.

Assign a special board to oversee the legal action against banks and implement the consumer protection law's obligations for the consumer protection organisation. Therefore, debtors may complain to the committee about unjust provisions in their contract. This body ought to take seriously the complaints made by consumers, report to the banks on how they are drafting such clauses and strike them out of the default loan contract template. The violating bank may also impose fines as compensation for the consumer. The committee may also ease and simplify the process of a lawsuit for all consumers, as well as shorten the lengthy procedures to make them affordable in terms of cost.

2. *Regarding the old principles dominance that prevent judge intervention in the personal loan contract to eliminate unfair terms*

It is advised that the Iraqi legislature adopt the United Kingdom's law regarding unequal bargaining power in light of the study's findings. The UK legal system has

accepted this idea, which has helped shape the laws protecting consumers from unfair terms in the contract. Inserting this doctrine will shrink the dominance of the stated old principles and allow a judge to intervene and balance the position between a lender and a creditor. Such a measure would also strengthen the position of the lender against a bank by empowering the former to take action and claim his or her unfair terms to the court under the law.

3. *Borrower's protection in the personal loan contract*

The fairness test's results show that language that respects customers' legitimate interests in its drafting and presentation is more likely to comply with the law. By establishing a standard evaluation over the contract overall and for any terms and conditions that may be unjust to borrowers, the fairness test of the standard form personal loan contract should be mentioned in the consumer protection law. The gray and blacklists present the tested examples and an ideal production of such an evaluation. As it might prevent a misunderstanding of the unreasonable provisions in a personal loan contract, such an approach would be advantageous to both consumers and courts.

4. *Exemption clauses*

Based on the study's findings, it is believed that any nation seeking to amend its consumer protection law should look to the UK (as one of European Law) as a good model, provided that such an effort is intended to serve the interests of consumers. This includes the development and regulation of case law, particularly the exemption clauses in a consumer contract. Any clause attempting to restrict or eliminate a

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party's liability for wrongful death or other personal injury brought on by that party's negligence is completely pointless under UK law.

7.6 Recommendations on Overall Banking Dealing by Directors

Based on the findings, the study proposes two recommendations:

1. The law should strictly uphold and enforce the norm of good faith before, during, and after the transaction. First things first, the good faith standard must be applied to protect the loan contract. Good faith is considered the highest and finest principle of manners and morals ever known to the laws. It is the principle that might be found in all contracting stages. Thus, contracting parties cannot conclude a contract without dealing with the good faith principle. When the parties begin a negotiation, they should observe good faith and consider honesty and integrity, as well as the prevention of fraud and cheating. The purpose of good faith is to establish a kind of reasonable balance between freedom of contract (which leads to concluding a contract) and adhering to the contract. The parties may also establish a balance between the minimum declaration of trust, stabilization, and seriousness in the negotiation stage.

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Negotiation needs to be considered before contracting in any kind of standard form contract. While the last require consent and real intention to do legal obligation. An execution of a contract with good faith needs the respect of both parties' secondary commitments, which arise from the agreement and be a part of it. The phrase and its use have a relationship to good faith. The rule's fundamental principle is "fair and open dealing, where terms are expressed fully, clearly, and legibly, with due respect

for the consumer's interests." Consumer contracts shouldn't contain oblique catch-alls or traps, and the clauses that might harm the client should be prominently displayed. By taking advantage of their vulnerability, banks shouldn't make decisions on what the rights and obligations of their clients are and how they should be articulated. Banks must also serve clients fairly and take into consideration their sincere interests. Consumers often have less bargaining power because of their low financial resources, the necessity of the personal loan they are taking, their inexperience with negotiations, and their overall lack of familiarity with the topics covered by the standard form loan contract. When designing a personal loan contract, it's crucial to take consumer behaviour into account, such as the fact that the majority of people don't carefully study written loan agreements before completing a purchase.

2. Transparency should be a requirement of the consumer protection law. Banks must act in an ethical and transparent manner; they must permit borrowers to thoroughly read personal loan contracts and give them all the details they require for them to make an informed decision. From time to time, a special authority should supervise such a procedure by interviewing the borrowers and inspecting whether they followed the procedures provided the bank officer in this regard.

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7.7 Chapter Summary

In this chapter, the most significant issues with Iraq's institutional and legal structure were highlighted. The results were next contrasted with those from the UK. The researcher then offered suggestions for strengthening the Iraqi legislative that were backed up by facts and justifications.

This chapter addressed the fourth study topic, which was how to make Iraqi laws and institutional duties that are designed to protect customers from unfair terms in personal loan contracts stronger. When the researcher addressed the recommendations on how Iraqi laws and institutional functions might be changed to safeguard consumers from injustice in a personal loan contract, the fourth study objective was also accomplished.

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In Iraq, the legal system is the civil law requires that every institution follow the provisions of the statute. It can be said that the legislative protection of the adhering party engaged in a personal loan contract has not yet reached the required level.

Although the majority of developed and developing countries, including the UK, have abandoned the idea of protecting the weak party impacted by the expansion of economic means to enter into a contract, ICC 1951 nevertheless applies the "authority of will" premise to all transactions. Therefore, it is believed that ICC 1951 is insufficient to shield the weaker party against unjustified clauses in the contract.

The aforementioned problem is a sign of the Iraqi judiciary's weakness when it comes to consumer protection-related concerns. In terms of protecting consumers from the unreasonable provisions included in the typical form of a personal loan contract, the court role could be summed up as ineffective. Courts usually have an

active role in developing a country' legal systems because such a case appears in front of them.

Iraq's unclear legal system contributes to lax oversight over the products of the banking sector there. The CBI should make a sincere effort to support consumer protection against standard form personal loan agreements, which are now considered the same as conventional contracts. In light of this, the banking industry's consumer protection regulations must be updated and improved as the UK. However, if the Iraqi government can completely implement the suggested solutions of this study, Iraq will have rules and regulations that would effectively safeguard consumers under a personal loan contract.

Since consumer protection is a common justification for the UK's regulation of financial services, both the economic and social grounds for regulation place some emphasis on the customer as its primary benefactor. But rather than being a homogeneous group, consumers are heterogeneous. While some people are affluent, others are not. Some people have doctorates, whereas others don't. Protecting such a sizable and varied population presents a number of challenges for the authorities.[536]

The main driving force behind and reason for financial services regulation is consumer protection. Consumers of financial services are perceived to need more protection than consumers of other goods and services for a variety of reasons. These include the amount of money at risk and the potential of principal-agent conflicts of interest, among others.

[536] Peter Cartwright, "The Vulnerable Consumer of Financial Services: Law, Policy and Regulation," n.d.

Financial services are typically considered to be experience or credibility commodities, which means that they frequently have attributes like quality or price that are hard to estimate at the moment of purchase. Given the large sums frequently involved, the length of many financial transactions, the significant information asymmetry between buyers and sellers, and industry incentive structures, regulatory intervention in financial markets is acknowledged as being necessary to protect consumers.[537]

The UK laws served as the benchmark or model for the improvement of the Iraqi laws. The demand for this type of loan is increasing worldwide. In Iraq particularly, the need for bank loans has increased following the increasing poverty and unemployment problems rates in the country.

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7.8 Conclusion

This study was conducted using a qualitative approach by means of a socio-legal research study. Such an approach tends to be exploratory in nature and often involves the use of an interview method. In this study, the interview method was employed to facilitate the researcher's discovery of any unfair circumstance surrounding a personal loan contract in Iraq. A pure legal or doctrinal research strategy is also thought to be able to improve the researcher's comprehension of the search area's pure legal difficulties. It was determined that an analytical approach would best suit the study's objective, which was to evaluate the key legal provisions of Iraqi law in an effort to combat injustice in loan arrangements.

[537] Mahony, Twigg-Flesner, and Akinbami, "Conceptualizing the Consumer of Financial Services: A New Approach?"

The present research concerns a law reform. In Iraq, customers face new difficulties every day, and the legal system faces new issues. The existing law is often found to be inadequate in dealing with such problems. Comparative legal studies include comparing the laws or judicial systems of various jurisdictions. Using this method, it is possible to identify the lessons that may be drawn from the successes and mistakes of other nations. Accordingly, the researcher made a partial comparison to propose some improvements to the Iraqi laws, which regulates unfairness in consumer loan contracts. Because this study bases its significance in the comparison between the concepts and rules of the UK and that of the Iraqi legal system, the most appropriate methodology was deemed to be the comparative law method.

The term "comparison of the various legal systems of the world" is used to describe the comparative law technique. This study focused on the laws and regulations in the UK that protect consumers against unfair terms in the loan contract. Additionally, the ICC grants courts discretionary power to assess and remove unfair terms in the contract in relation to the unfair contract terms in Iraq. Accordingly, this research looked into the UK laws in protecting the interests of consumers. The UK's law was then compared with the role of the courts and government authorities in Iraq to enhance the Iraqi regulatory system. Consumer protection from injustice in a personal loan contract is becoming a fundamental requirement for citizens worldwide. A personal loan contract is considered risky since it is a common document provided by a bank. In the contract with the professional staff and economic status, banks are the stronger party.

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According to study, customers of personal loans in Iraq have been harmed by unfair loan terms, such as exorbitant interest rates, unilateral modifications to the terms without their approval, getting a standard form from the bank, and being denied the chance to negotiate the terms and conditions. The unjust provisions in their loan contract are not shielded from Iraqi consumers. A personal loan contract's unfairness is also covered by no specific law, with the exception of a 1951 Civil Law clause about adhesion contracts that is out-of-date and did not take consumers' needs into account.

Furthermore, the awareness of the consumer protection principles in the Iraqi institutions is still under-developed in the way of following the regulations of the CBI and provisions of the stated laws. The consumer's knowledge of his rights both before and after signing the loan contract is not acknowledged by these laws. The borrowers in Iraq are unfortunately in a very weak position, and their financial interests are fragile because of their unawareness of their rights. On the other hand, the ignorance of responsibility on the part of the Iraqi authorities requires heedfulness. To discuss how to safeguard consumers from unfair terms in personal loan contracts, examples from other emerging nations should be used.

In conclusion, customers today drive the banking sector. Protecting their rights while dealing with banks should be their first priority because a personal loan contract is considered to be a standard agreement contract between the bank and the consumer. It goes into effect when the bank makes the loan that was required for the contract to be legal. It is commonly accepted that a personal loan is riskier since it involves a

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standard form contract provided by the bank. The bank is the most powerful party in a credit contract agreement drafted by the competent staff and financial experts.

There are legal gaps in Iraq that affect the protection of customers who work with banks. In the usual form personal loan contract, the consumer party has been harmed by unfair terms in the high-interest condition. In addition, banks occasionally change terms without informing borrowers. Additionally, there isn't a single legal precedent or piece of legislation that addresses the injustice of a personal loan arrangement. This research aims to uncover such significant issues and conduct a practical poll on them by first examining the legal issues surrounding the creditor protection against unfair terms included in loan contracts and then by analyzing the Iraqi laws and their sufficiency in protecting creditors from unfair contract terms in bank loan contracts. Given these challenges, this study made an effort to apply a legal research methodology to evaluate the pertinent consumer protection provisions of the 2010 Consumer Protection Law (CPL) and the 1951 Iraqi Civil Code (ICC).

The civil law academic community, bank administrators, and legal specialists participating in civil courts were all contacted using an unstructured interview technique to gather information. According to this study, personal loan contracts are specified contracts subject to the ICC's general standards, which are out-of-date and do not provide the necessary protection. These clauses are viewed as inadequate and were not developed in a way that protects consumers of personal loan contracts, despite the fact that civil court judges have usually implemented it.

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The CPL has not solved the issues with unfair terms in a personal loan contract and is not currently in existence. A reliable and effective regulatory structure may increase security and confidence in the financial industry. It is recommended that new legislation be established to address the aforementioned issues and risks that creditors face when they enter into contracts with banks. The provisions of the CPL may also be utilised to create a separate board for the financial litigation against banks. The CPL must be changed immediately in order to keep up with developments in UK law in response to these issues.

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Appendix A

Consumer protection from unfair terms in a loan contract in Iraq

Open-ended Interview

Supervisor

Prof. Dr. Asmah Laili Yeon

By

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Doctor of Philosophy

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Background of this research

In Iraq, the banking sector is developing in terms of number and service provided, yet the law has not developed in a manner warranted to protect consumers of financial services against imposition of standard loan contract provided by banks. The Iraqi laws of contract is not the supporter of consumer rights, particularly in standard form contracts and the area of unfair terms included in the consumer contracts by traders.

This research aims to provide a detailed explanation of consumer protection against the unfair terms included in a consumer's loan contracts. The objective of this study is to provide explanation about unfairness of terms in loan contracts and the remedies available to consumers if there is any. Because these issues are not solved or discussed sufficiently in the Iraqi's laws.

The study also intends to discuss the extent to which the current legal rules or sections included in the Iraqi laws are sufficient in protecting consumers. In particular, it will look to the developed law in UK that deals with unfairness in the consumer contract, the purpose being to assess the comprehensiveness of the legal protection for vulnerable consumers in Iraq.

The researcher has limitation to assess the legal situation in the Iraqi judicial treatment with unfairness in a loan contract. Therefore, this tool will facilitate the study in providing sufficient information about this issue and in achieving the research objectives. Therefore, seeking for your experience to enrich the data for this research.

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The following are the questions and objectives of the study:

1.3 Research Questions

To address the legal issues in this research, the following research questions are extracted for this area:

1. What is the legal issues arising from unfairness included in the standard form contract provided by the banks in Iraq through the lending proess?
2. Does the Iraqi laws protecting consumers from unfair terms in the standard form personal loan contracts?

3. How do the Iraqi, UK and other laws protect the consumer against unfairness provided by banks in loan contracts?

1.4 Research Objectives

This research aims to provide a detailed explanation of consumer protection against the unfair terms included in a consumer's loan contracts. Specifically, the study aims to fulfil the following objectives:

1. To investigate the legal issues arising from unfairness included in loan contracts and their remedies, if there is any.
2. To examine the Iraqi institutional role in providing consumer protection from the unfairness in a loan contract.
3. To make recommendations to enhance the Iraqi law in providing consumer protection against unfairness in a loan contract, particularly by comparing with UK and other developed countries in this regard.

Basically the benefits of the research and your participation are:

1. You will be given the results and conclusions.
2. The results of this study are helping law practitioners to enhance consumer protection from unfair terms in a standard loan contract.
3. Opportunity to develop the academic experience in the legal issues related to the standard loan contract that provided by banks in Iraq.

You are advised to answer the questions based on your knowledge and experience. Your cooperation is greatly appreciated. In addition, I would like to take this opportunity to express my heartfelt thanks to you for your very active participation and time or effort that have you given to the achievement of this study. I hereby enclosed the following items:

PART A: PERSONAL INFORMATION

PART B: LEGAL ISSUES INCLUDED IN THE STANDARD LAON CONTRACT AND THE REMEDIES FOR THE UNFAIRNESS.

PART C: IRAQI INSTITUTIONAL ROLE IN PROVIDING CONSUMER PROTECTION FROM THE UNFAIRNESS IN A LOAN CONTRACT.

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Best Regards,

Marwah Saadi Saleh

PART A: PERSONAL INFORMATION

1. Name: _____
2. Organization: _____
3. Organization's Website: _____
4. E-Mail: _____
5. Telephone No: _____
6. What best describes your current position in your organization?

[ ] Bank officer [ ] Judge

[ ] Lawyer [ ] Consumer

[ ] Legal Auditor [ ] Consumer organization officer

[ ] Academician of Law

[ ] Other _____

7. Expertise _____

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PART B: LEGAL ISSUES INCLUDED IN THE STANDARD LAON CONTRACT

1. What are the legal principles that you consider it when you judge the standard personal loan contract? What are the legal issues that you arising it in these cases?

ما هي المبادئ القانونية التي تعتبرونها عند الحكم على عقد القرض الشخصي القياسي؟ ما هي القضايا القانونية التي تنشأ عنها في هذه الحالات؟

2. When you have unfair standard loan contract case between bank and consumer what will you use (law or provisions) to protect the weaker party?

عندما يكون لديك حالة عقد قرض قياسي غير عادل بين البنك والمستهلك ما سوف تستخدم (القانون أو الأحكام) لحماية الطرف الأضعف؟

3. Standard loan contract is including a huge disparity between the parties, from one side banks have higher legal experience and financial ability to post its terms and conditions without let the other party discuss it (i.e. take it or leave it), what is

your opinion about that? If it is right do you know that most of developed and developing countries are developed their laws to keep the balance between the parties to protect the weaker party. Do you suggest doing same to the old Iraqi laws?

عقد القرض القياسي يتضمن تفاوتا كبيرا بين الطرفين، من جانب واحد, البنوك لديها الخبرة القانونية العليا والقدرة المالية على نشر شروطها دون السماح للطرف الآخر مناقشته (أي خذه أو اتركه)، ما هو الرأي الخاص بك حول ذلك؟ إذا كان صحيحا هل تعلم أن معظم البلدان المتقدمة والنامية وضعت قوانينها للحفاظ على التوازن بين الطرفين لحماية الطرف الأضعف. هل تقترح نفس الشيء على القوانين العراقية القديمة؟

4. What are the legal issues that you consider it when you hold a case of unfair terms in a personal loan contract to protect the consumer?

ما هي القضايا القانونية التي تعتبرها عند توكيلك بقضية شروط غير عادلة في عقد قرض شخصي لحماية المستهلك؟

5. Where the borrower having a legitimate interest in the matter to sue the banks against the unfair terms in their standard personal loan contract, where they should go to claim their rights? And what are the legal issues should be raised to support their case based on Iraqi laws? What is the role of law in this situation?

إذا كان للمقترض مصلحة مشروعة في مقاضاة المصارف ضد الشروط غير العادلة في عقد القرض الشخصي المعياري ,اين ينبغي أن يذهب للمطالبة بحقوقه؟ وما هي المسائل القانونية التي يجب أن تثار لدعم قضيتهم على أساس القوانين العراقية؟ ما هو دور القانون في هذه الحالة؟

6. If the banks include term to exclude or limit their liability for breach of contract, does it fair or unreasonable? If the term is unreasonable is it considered fair or unfair?

إذا كانت البنوك تتضمن شرطا لاستبعاد أو الحد من مسؤوليتها القانونيه عند خرق العقد، هل هو عادل أو معقول ؟ إذا كان هذا المصطلح غير معقول هو يعتبر عادل أو غير عادل؟

7. When the consumer is lacking the mental or knowledge capacity to understand the nature of the personal loan contract or the consumer does not have experience in the terms of agreement and what will happens in the future like (currency and interest rate calculation), is the contract is valid or it effect the enforcement if the bank is realised that?

عندما يفتقر المستهلك القدرة العقلية أو المعرفة لفهم طبيعة عقد القرض الشخصي أو المستهلك ليس لديه خبرة في شروط الاتفاق وما سيحدث في المستقبل مثل (العملة وحساب سعر الفائدة)، هل سيكون العقد ساري المفعول أو أنه سيؤثر على النفاذ إذا ادرك البنك ذلك؟

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8. If the lender under syndicated facility accelerated the loan and demanding repayment from the borrowers, is it fair or not (if yes please say why and if it is no please explain)?

إذا قام المقرض بموجب التسهيلات المشتركة بتسريع القرض وطالب المقترضين بالسداد ، هل هو عادل أم لا (إذا كانت الإجابة بنعم، فيرجى قول السبب، وإذا لم يكن من فضلك يرجى التوضيح)؟

9. When the bank officer know that the borrower is under assured or unfairly influenced in agreeing to be responsible, so another person's debts, is he will bound by the loan contract? Why?

عندما يعرف موظف البنك أن المقترض هو مدفوع أو تأثر بشكل غير عادل في الموافقة على توقيع عقد القرض، لذلك، هل هو ملزم بعقد القرض؟ لماذا ا؟

10. Does the court assess the fairness and unfairness of loan contract? What will happen after assessment?

هل تقيم المحكمة عدالة او تعسف عقد القرض ؟ ماذا سيحدث بعد التقييم؟

11. Overall, recently, how do you evaluate the fairness in the standard personal loan contract?

بشكل عام، في الآونة الأخيرة، كيف تقيمون الإنصاف في عقد القرض الشخصي القياسي؟

12. Do know your rights and remedies before you sign the loan contract? In your opinion, are the Iraqi laws adequate to protect your position as the weaker party in the loan contract?

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هل تعرف حقوقك وسبل انتصافك قبل التوقيع على عقد القرض؟ برأيك، هل القوانين العراقية كافية لحماية وضعك كطرف أضعف في عقد القرض؟

13. Where the borrower having a legitimate interest in the matter to sue the banks against the unfair terms in their standard personal loan contract, where they should go to claim their rights? And what are the legal issues should be raised to support their case based on Iraqi laws? What is the role of law in this situation?

إذا كان للمقترض مصلحة مشروعة في هذه المسألة أن يقاضي المصارف ضد الشروط غير العادلة في عقد القرض الشخصي النموذجي اين ينبغي أن يذهب للمطالبة بحقوقه؟ وما هي المسائل القانونية التي يجب أن تثار لدعم قضيتهم استنادا الى القوانين العراقية؟ ما هو دور القانون في هذه الحالة؟

PART C: IRAQI INSTITUTIONAL ROLE IN PROVIDING CONSUMER PROTECTION FROM THE UNFAIRNESS IN A LOAN CONTRACT.

1. Do you recommend a unified terms in the standard loan contract and to be declared as unfair and not enforceable by the civil and commercial law?

هل توصى بشروط موحدة في عقد القرض النموذجي , وأن يعلن أنها غير عادلة وغير قابلة للتطبيق من قبل القانون المدني والتجاري؟

2. Do you think that the Iraqi national law provide adequate and effective means enabling consumers to remedy the effects of the loan?

هل تعتقد أن القانون الوطني العراقي يوفر وسائل كافية وفعالة تمكن المستهلكين من معالجة آثار القرض؟

3. Do you see any obstacles for the effective of consumer protection laws against unfair terms in a loan contract?

هل ترى أي عقبات أمام تفعيل قوانين حماية المستهلك من الشروط التعسفيه في عقد القرض؟

4. What are you recommendations to the Iraqi legislature to strengthen the weaker party in the standard loan contract? In your opinion, do you suggest amendment or change?

ما هي توصياتكم إلى الهيئة التشريعية العراقية لتعزيز الطرف الأضعف في عقد القرض النموذجي؟ برأيك، هل تقترح تعديل أم تغيير؟

5. As you are lawyer means that you should achieve the justice and equity to protect the weak party in personal loan contract, what is your suggestion to balance the rights and obligation between banks and consumer in the loan contracting process?

كمحامي يعني أنك يجب ان تحقق العدالة والإنصاف لحماية الطرف الضعيف في عقد القرض الشخصي، ما هو اقتراحكم لتحقيق التوازن بين الحقوق والالتزامات بين البنوك والمستهلك في عملية عقد القرض؟

6. Do you agree with me that there is alarming unfair terms and conditions in the standard personal loan contract deserve to get the academic and legislature attention?

هل توافقني الرأي على أن هناك شروطا غير عادلة دقت جرس الانذار في عقد القرض الشخصي النموذجي تستحق أن تحظى بالاهتمام الأكاديمي والتشريعي؟

7. Is the lack of knowledge and awareness among borrowers on their legal rights and their urgent need for loan contributed to overlook the development of the civil laws that concerning consumer protection from the unfair terms in their standard contract?

هل ساهم الافتقار إلى المعرفة والوعي لدى المقترضين بحقوقهم القانونية وحاجتهم الملحة إلى القروض في التغاضي عن تطوير القوانين المدنية المتعلقة بحماية المستهلك من الشروط التعسفيه في عقدهم النموذجي؟

8. Where the courts or administrative authorities should have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts. In your point of view, what is the role that the Iraqi

institutions of legal issues (courts, administrative authorities, lawyers and organizations), specially the judges since the law give them discretionary power to eliminate the unfair terms in the adhesion contract in changing the provisions of civil laws to protect the weaker party in the loan contact from the unfair terms?

ينبغي أن تكون للمحاكم أو السلطات الإدارية وسائل كافية وفعالة لمنع استمرار تطبيق الشروط غير العادلة في عقود المستهلكين. من وجهة نظرك، ما هو دور المؤسسات العراقية في القضايا القانونية (المحاكم والهيئات الادارية والمحامين والمنظمات) وخاصة القضاة منذ ان منحهم القانون سلطة تقديرية للقضاء على الشروط غير العادلة في عقد الاذعان في تغيير أحكام القوانين المدنية لحماية الطرف الأضعف في عقد القرض من الشروط التعسفيه؟

9. Do you ask for loan contract specialist to interpret and explain the terms and condition to you, or you just sign because this is standard are taken by many people before?

هل تطلب من أخصائي قانوني في عقد القرض تفسير وشرح الشروط والأحكام لك، أو انك مجرد توقع العقد لأن هذا هو نموجي معتمد و اتخذته كثير من الناس من قبل؟

10. Are the terms of the loan contracts standardised by the bank or Central Bank of Iraq?

هل شروط عقود القرض موحدة من قبل البنك أو البنك المركزي العراقي؟

11. Does the bank adhered in default interest rate for the personal loan contract?

هل يلتزم البنك بنسبة فائدة افتراضية معينة لعقد القرض الشخصي؟

12. UK developed a new and special legal system to protect consumers of financial service which included the essential legal issues in the unfairness of standard contracts between banks and borrowers, do you think that the Iraqi legislator should take advantage from this experience to develop the old laws?

وضعت المملكة المتحدة نظاما قانونيا جديدا خاصا لحماية مستهلكي الخدمات المالية يشمل المسائل القانونية الأساسية في تعسف العقود القياسية بين المصارف والمقترضين، وهل تعتقد أن المشرع العراقي ينبغي أن يستفيد من هذه التجربة لتطوير القوانين القديمه ؟

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Appendix B

INFORMED CONSENT FORM

Dear participant

My name is Marwah Saadi, a PhD candidate at the College of Law, Universiti Utara Malaysia (Northern University of Malaysia).

Firstly, I would like to express my heartfelt appreciation and thank you for volunteering to participate in this interview which is an essential part of my PhD research work entitled "A Study on a Consumer Protection for Unfair Terms in the Personal Loan Contract of Iraqi Banks." During the course of the interview, the following points will highlight the institutional and legal mechanisms that are used to tackle the issues unfair terms in the personal loan contract with banks in Iraq and to explain why they are not able to resolve the unfairness problem:

Soundly- The researcher would like to seek your kind permission to be interviewed. Your participation in this research is absolutely voluntary and the interview may be audio or video recorded subject to you giving prior consent.
Thirdly- The venue and time for the interview shall be determined by your good self and shall be at your convenience. It is estimated that the interview will take about one hour.
Fourthly- You may choose not to take part in the interview and in the event you choose to take part in the interview, you are free to withdraw from being interviewed at any time and without having to give any reasons for the withdrawal.
Fifthly-The identity of all participants will be kept confidential upon request and all information collected during the interview shall be used in the study.
Sixthly- If you need further clarifications on the above-mentioned matter or need more information, the researcher can be contacted through the following:

Mobile phone no: 07722002987; and

Email address: marwah_ss88@yahoo.com

Name _____.

Occupation _____.

Address _____.

Phone No _____.

Signature and date _____.

Appendix C

Background of Participants' Information in the Field of Study

Categories	Number of respondents	Date of interview	Place of interview	Occupation	Status
Lawyers who are expert the loan contracts from different firms.	R1	10, February 2017.	Basrah court of appeal	Certified judicial expert	President of the Iraqi bar association in Basrah
	R2	10, February, 2017	Basrah court of appeal	Senior lawyer since 2004	Lawer at the Iraqi bar association in Basrah
	R3	11, February 2017.	Civil court	Member of the Iraqi jurists' union	Representative of jurists at the University of Basrah
	R4	11, February 2017.	Civil court	lawyer	Member of the union of Arab jurists
	R5	11, February 2017.	Civil court	lawyer	Civil law lawyer
Legal academicians who are expert in consumer protection from the consumer protection organization.	R6	15, February 2017.	University of Basrah/collage of law	Law lecturer	Academician and legal writer
	R7	15, February 2017.	University of Basrah/collage of law	Law lecturer	Academician and legal writer
	R8	17, February 2017.	University of Baghdad	lecturer	Academician
	R9	20, February 2017.	University of Basrah/collage of law	Legal expert	Dean of collage of law
Judges Personal loan consumers that already got loan from banks	R10	16, February 2017.	Basrah court of appeal	judge	Vice president of the Basrah Court of Appeal
	R11	16, February 2017.	Basrah Civil court	judge	President of Civil court
	R12	18, February, 2017.	Basrah Civil court	judge	Member of the Basrah court of appeal
	R13				Criminal judge
Officers from 4 commercial banks. a. Legal	R14	17, February, 2017	Alrafidain Bank	officer	manger of the Al Rafidain Bank
	R15	18, February,	Alrasheed Bank	officer	Senior manager of

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officer b. Specialise officer in charge of loan contracts		2017			the Alrasheed Bank
	R16	19, February 2017	United Bank for Investment (UBI)	officer	The managing director of Credit (UBI)
	R17	19 February, 2017	United Bank for Investment (UBI)	officer	United Bank for Investment (UBI)'s chief executive officer
Personal loan consumers that already got loan from banks	R18 R19 R20 R21 R22 R23 R24 R25 R26 R27	11-19 February, 2017	Basrah	consumers	

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Appendix D

Important Iraqi Civil Code Provisions

LAW NO.40 OF 1951
THE CIVIL CODE

We hereby order the promulgation of the following law which has been passed by Parliament:

PRELIMINARY PART

Chapter 1 - Application of the Law

Article 1. - (1) The legislative provisions shall apply to all matters covering these provisions in letter trend and content.

(2) In the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of the Islamic Shari'a which are most consistent with the provisions of this Law but without being bound by any specific school of thought; and otherwise in accordance with the laws of equity.

(3) The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq.

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Article 145. - A contracting party is under an obligation to perform his obligation (under the contract) whatever may be the object of the contract.

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IRAQ 1 & 2/1990: THE CIVIL CODE

Article 146. - (1) Where a contract has been performed it is legally binding and neither party may revoke or amend it except pursuant to a provision in the law or by mutual consent.

Article 166. - Doubt will be construed to the benefit of the debtor.

Article 167. - (1) In contracts of adhesion the acceptance will be confined to the mere submission to a draft (pre) contract (avant contrat) formulated by the offeror in a specific form beforehand which is not negotiable inasmuch as the offer is concerned.

(2) With a contract of adhesion which has been concluded which contained arbitrary conditions the court

may amend or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of equity; every agreement otherwise will be null and void.

(3) The ambiguous terms of a contract of adhesion may not be interpreted (construed) to the prejudice of the interest of the adhering party even where he is the creditor.

(3) Contractual Responsibility (Warranty of the Contract)

Chapter 4 - Loans and Annuities

Section (i) - Loans

Article 684. - A loan is where a person gives to another person a designated definite fungible thing which is consumed by enjoyment the comparable thing of which he will return (restitute).

Article 685. - A guardian may not borrow the property of someone who is under his guardianship.

Article 686. - (1) The borrower will own the thing borrowed by taking delivery thereof and his liability on a comparable thing is established.

(2) If the thing borrowed has perished after the contract and before taking delivery thereof the borrower shall not be liable.

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Article 687. - (1) If a hidden defect appeared in the thing loaned which was interest free and the borrower preferred to accept it and informed the lender accordingly he shall not be obligated to restitute except its value as defective.

(2) But when the loan bears interest or does not bear interest and the lender has deliberately hidden the defect the borrower may demand either that the defect be repaired or that the defective thing be replaced with a thing which

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Article 688. - If the thing is dispossessed the provision governing sales shall apply if the loan was interest free; otherwise the provisions governing loans for use will apply.

Article 692. - (1) Interest will not be obligatory on the loan unless it has been stipulated in the contract.

(2) If the borrower has paid interest in excess of the legally permissible rate he may recover the excess irrespective of whether he had paid it knowing it to be excessive or by mistake.

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Article 146. - (1) Where a contract has been performed it is legally binding and neither party may revoke or amend it except pursuant to a provision in the law or by mutual consent.

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Article 171. - Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof he shall be obligated to pay to the creditor by way of damages for the delay a legal interest at the rate of four per cent in regard to civil matters and five per cent in respect of commercial matters; this interest will commence from the date of filing a judicial claim in respect thereof if the agreement or the commercial usage has not fixed a different date for the running of the interest save in all cases where the law has provided otherwise.

Article 172. - (1) The contracting parties may agree on another rate of interest (other than those mentioned in the preceding Article) provided it shall not exceed seven per cent; where the parties had agreed on a higher rate (of interest) it shall be reduced to seven per cent and the surplus which has been paid must be refunded.

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