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**The American University in Cairo**  
**School of Global Affairs and Public Policy**

**CONSUMER PROTECTION IN E-COMMERCE: A CASE STUDY  
OF EGYPT**

**A Thesis Submitted by**

**Heba Habib**

**To the Department of Law**

**Spring 2021**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

The American University in Cairo  
School of Global Affairs and Public Policy

CONSUMER PROTECTION IN E-COMMERCE: A CASE STUDY OF EGYPT

A Thesis Submitted by

*Heba Ahmed Habib*

to the Department of Law

Spring 2021

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## CONSUMER PROTECTION IN E-COMMERCE: A CASE STUDY OF EGYPT

*Heba Habib*

Supervised by Professor Thomas Skouteris

### ABSTRACT

This paper examines electronic contract regulation in the context of business-to-consumer transactions. The technological advancement and cross-border nature of e-commerce have posed significant challenges to the Egyptian legal framework highlighting the limitations of general commercial contract rules with regards to electronic contracts. This thesis argues that access to the courts is hindered by restrictive terms in the electronic contracts over which the Egyptian law has no jurisdictional power. Accordingly, private institutions set the rules in the e-contracts and enforce them through private methods leaving no room for state intervention to ensure the protection of consumers. Hence, the application of national consumer law is impaired by the private practices that shape the transaction to their best business ends. Consumer protection is essential to promote access to the online market since it serves as a safety valve in face of the electronic risks. So, to increase the level of protection for consumers conducting e-transactions, the Egyptian legislator should adopt reforms to control the private mechanism to ensure consumer rights' application instead of informal negotiations to satisfy consumer's problems.

### KEYWORDS:

contract, electronic contract, business-to-consumer transactions, e-commerce, consumer protection, conflicting consideration model, Egypt e-commerce regulations, consumer protection agency, private ordering, online dispute resolution.

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## I. Introduction

*“Consumers, by definition, are all of us.”*

John F. Kennedy<sup>1</sup>

In one of my online purchases, I was offered a free 7-day trial for the software product “Acrobat Pro DC” from Adobe, Inc. I accepted the offer thinking that it would be helpful for my work, which turned out to not be the case given that the software was too advanced for my needs. Surprisingly, after 3 months, I found that Adobe, Inc. had started deducting subscription fees from my credit card on a monthly basis due to the fact that I had entered my payment details while accepting their offer. I submitted a letter of complaint on their automated customer support chat system. They replied that I should adhere to their subscription and cancellation terms, as I had clicked the “I accept” button, which stated that the seller would start deducting subscription fees should the client cancel their order before the end of the trial week.<sup>2</sup> The customer service even recommended maintaining my subscription for six months for the never-used service, as cancellation before that date would lead to an instant deduction of half of the yearly subscription fees. After several rounds of negotiations, I received an amicable settlement offer which consisted of a refund equivalent to the fees of two months. I accepted the offer as it was the best available option.

As the preceding anecdote highlights, the form of transacting has evolved with technological advancement. Electronic commerce is taking over the traditional form of trading that included paper documents and face-to-face interactions. In contrast, electronic transactions are completed with ‘a click’. This mode of contracting requires an in-depth look into the legitimacy of this form of contracting concerning the level of protection granted to the consumer. Conducting business over the internet opens access to different business models to target consumers from all over the world, for example, companies with a strong physical presence that expand through the internet (click and brick) while others that have only a virtual online presence (click only companies). E-commerce represents an all-inclusive forum to engage businesses and households of all sizes with different

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<sup>1</sup> See “Special Message to Congress on Protecting Consumer Interest, 15 March 1962 | JFK Library.” Accessed October 31, 2020.

<sup>2</sup> [https://www.adobe.com/mena\\_en/legal/subscription-terms.html](https://www.adobe.com/mena_en/legal/subscription-terms.html).

categories of consumers from all over the world. Such a changing business landscape calls for innovative reforms in the Egyptian legislative landscape to protect consumers since physical access to the sellers who may be domiciled in another state is no longer possible.

Consumer protection is one of the main areas that need to be addressed to ensure a safe environment for e-commerce. For the same reason, the shift to the electronic marketplace poses several legal challenges for Egyptian legislators, business firms, and consumers. Moreover, the importance of e-commerce has grown with the hit of covid-19 and the restrictions on physical contact, traveling, and lockdowns. Commercial transactions are conducted electronically, and consumers just ‘a click’ and pay to receive what they want ranging from small products to large appliances and medical and educational services. Leveraging e-commerce is becoming a necessity as per the World Bank recommendations given that it prevents the spread of the pandemic and provides consumers with their needs in contactless transactions.<sup>3</sup> E-commerce has become a preferred transaction channel for both consumers and businesses. Nonetheless, this mode of trading poses higher risks on the consumer which inevitably creates problems that demand innovative regulating and enforcement methods. In this context, enforceable protection regime serves as an incentive for consumers to participate effectively in e-commerce as it demonstrates that their rights are protected regardless of the cross-territorial nature and technological factor.<sup>4</sup> In sum, a higher consumer protection level will expand consumers’ access to e-commerce and encourage taking the risk of the online market.

The thesis argues that the Egyptian regulatory model of E-contract does not provide an adequate level of protection for E-consumers given that the access to litigation is impaired by virtue of the E-contract’s restrictive provisions. Further, it argues that the Egyptian legislative model allows access to private institutions’ mechanisms which result in shaping the consumer rights as per the E-contract terms and conditions instead of the substantive

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<sup>3</sup> Ungerer, Christoph, Alberto Portugal, Martin Molinuevo, and Natasha Rovo. *Recommendations to Leverage E-Commerce During the COVID-19 Crisis*. World Bank, 2020.

<sup>4</sup> Aref, Mayada M., and Ahmed E. Okasha. “Evaluating the Online Shopping Behavior among Egyptian College-Educated Community.” *Review of Economics and Political Science* 5, no. 1 (January 1, 2020): 21–37. <https://doi.org/10.1108/REPS-10-2018-0013>.

Egyptian consumer law. The failure of the Egyptian regulatory model to cope with the challenges of e-commerce leads to the dominance of private ordering practices which has shifted the understanding of consumer rights from the mandatory rights stipulated under the national consumer protection law to consumer interests as per the provisions in the E-contract. Hence, the Egyptian regulatory regime should adopt reforms to empower consumers and monitor the private procedures to increase the level of protection for electronic consumers.

This paper examines the B2C E-contract regulation in Egypt with respect to the level of protection granted to E-consumers. The first chapter explains the nature of the E-contract and introduces the methodology by which the E-contract regulation in Egypt is examined: the conflicting consideration model. The second chapter describes the Egyptian legislative landscape through the lens of formal, substantive, and institutional considerations. The third chapter presents the methods adopted by the private institutions to substitute the inefficient public regulations and prescribes reforms to improve the level of protection for E-consumers.



## II. The E-contract

Technological advancement is taking over the communication industry, which results in innovative methods to arrange Business-to-Consumer (B2C) contractual relations via the internet.<sup>5</sup> The Electronic contract (E-contract) is the result of this advanced technology. The E-contract becomes the core of any online transaction including the purchase of music downloads, software, flight tickets, and any tangible product. The E-contract takes the form of a Standard Form Contract (SFC) that was generally adopted in B2C offline transactions.<sup>6</sup> Thus, the technological factor played a vital role in changing the form of contract. E-contract may take the form of “clickwrap”, browse warps, and scroll wraps.<sup>7</sup> The different presentation styles of the E-contract contributed to a low level of awareness among consumers with regards to the nature of the transaction.<sup>8</sup> Having said this, the different nature of E-contract suggests that the consumer may enjoy a lower level of protection compared to their offline counterparts keeping in mind that the E-contract belongs to the class of standard form commercial contracts. So, this chapter examines the theoretical aspects of the contract to have a concrete understanding of the nature of e-contract. The chapter is divided into three sections: the contract, theoretical framework, and conflicting considerations of the E-contract. The first part addresses the different nature of SFC from the classic notion of contract and why this may be problematic. Secondly, a brief of the schools of the contract theory follows to introduce the methodological lens by which the e-contract is analyzed. In this part, I resort to Fuller and Duncan Kennedy’s work to look into the subject matter. The conflicting considerations framework equips me with a grid to analyze the political, economic, and social parameters of the e-contract under the classification of formal, substantive, and institutional considerations. The last section

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<sup>5</sup> OECD. *Guidelines for Consumer Protection in the Context of Electronic Commerce*. OECD, 2000.

<sup>6</sup> offline transaction means transaction conducted through face -to face communication. see Radin, Margaret Jane. *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*. Princeton University Press, 2013.

<sup>7</sup> Yuthayotin, Sutatip. *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms*. Springer International Publishing, 2015. (“click wrap” terms and terms and conditions are presented through the computer monitor and the assent is manifested by pressing “the I accept” button. “browse wrap” contract is available through accessing hyperlink on website and reading the content without the need of manifestation of assent. “Scroll-wraps” is confirmed by scrolling down the terms and conditions and click “I agree” box. “shrink wrap” agreement is always associated with the sale of software as it takes the form of a piece of paper wrapped in plastic wrap that can be accessed after the purchase transaction is completed.)

<sup>8</sup> Slawson, W. David. “Standard Form Contracts and Democratic Control of Lawmaking Power.” *Harv. L. Rev.*, no. 3 (1971): 529–66.

presents an in-depth analysis of the model, being an interpretive tool to analyze the regulatory structure of E-contract.

#### A. The Contract

The contract may be defined as “a legally enforceable promise.”<sup>9</sup>The contract is an agreement between two or more parties to enforce the intent of the parties and to ensure the security of the transaction.<sup>10</sup> The contract is previewed as the party’s manifestations of mutual consent, which result in creating legal obligations on its contracting parties.<sup>11</sup> The traditional notion of contract implies that it is the output of a process of negotiation that satisfies the needs of both parties<sup>12</sup>. Thereby, each party is granted the freedom to design the agreement in response to their own interests and needs. The parties are supposed to be on equal footing with social and economic standards to mitigate the risk of exploitation.<sup>13</sup> Moreover, individuals are expected to have freedom of choice and the right to withdrawal from any disfavored offer. In other words, each party has the right to shop for what best serves their interests. So, three features are considered essential in the classic formation of contracts which are negotiation(bargaining power), equal footing, and freedom of choice. In response, the legal formality of the contract is designed by law in order to make sure of channeling the intent of the parties.<sup>14</sup>

Traditionally, contract law is perceived as a set of rules that regulate the private order. It is the law of self-imposed obligations.<sup>15</sup>Contract law endorses the enforcement of private agreements for two main reasons. First, contract facilitates the economic exchanges and accordingly promotes social welfare. Secondly, the contract protects the rights and duties of the private parties<sup>16</sup>. So, the ultimate purpose of contract law is to secure exchanges in

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<sup>9</sup> Morgan, Jonathan. *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law*. New York, UNITED STATES: Cambridge University Press, 2013.

<sup>10</sup> *Supra note*, at 8.

<sup>11</sup> Slawson, W. David. “The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms.” *University of Pittsburgh Law Review* 46, no. 1 (1985 1984): 21–74.

<sup>12</sup> Kessler, Friedrich. “Contracts of Adhesion--Some Thoughts about Freedom of Contract.” *Columbia Law Review* 43, no. 5 (July 1943): 629.

<sup>13</sup> Kimball, Bruce A. “Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature.” *Law and History Review* 25, no. 2 (ed 2007): 345–99.

<sup>14</sup> Kennedy, Duncan. “Legal Formality.” *The Journal of Legal Studies* 2, no. 2 (1973): 351–98.

<sup>15</sup> Smith, Stephen A., and P. S. Atiyah. *Atiyah’s Introduction to the Law of Contract*. OUP Oxford, 2006.

<sup>16</sup> *Supra note*, at 15.

the marketplace by providing remedies for breaches of a contract either through ordering the breaching party to perform or to pay damages. Hence, this gives the impression that contracts are based on harmonious rules of formation and performance.<sup>17</sup> To conclude on this part, the standard understanding of contract entails that the freedom of the parties (private autonomy) is the essence of contract legitimacy and accordingly the rules are created to serve the manifestation of the party's intent to legally bound themselves. Hence, courts are equipped with the power to enforce those contracts to maintain the certainty and predictability of private transactions. However, this classic notion of the contract is contradicted with the specialized nature of the class of SFC as will be demonstrated in the upcoming section.

### 1. Standard-Form Contracts (SFC)

A standard contract may be defined as “a contract entered into totally or partially according to pre-drawn terms and intended to be applied similarly in a large number of individual cases irrespective of individual differences”.<sup>18</sup> The use of (SFC) started in the industrialization era of consumer products.<sup>19</sup> Commercial contracts were customized in response to the social need for an efficient device to regulate the exchange of goods and services. So, the new business world dictated a new mode of mass contracting directed to markets of high volume and low value of consumer products. When the mass production of consumer products flourished in the 1960s, consumer contracts were standardized to keep up with the regulation of a quickly developing business world. It represented almost all of the consumer transactions.<sup>20</sup> In contrast to the traditional understanding of Contract, SFC has seven distinctive features as described by professor Rakoff.<sup>21</sup> First, SFC is presented in a non-traditional form as a contract. Second, a consumer contract is one-sided imposed terms that are set by the stronger party.<sup>22</sup> Third, the businesses are the expert in

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<sup>17</sup> *Supra note*, at 12.

<sup>18</sup> Sheldon, J. E. (1974). Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control. *American Journal of Comparative Law*, 22(1), pp. 17-70

<sup>19</sup> Slawson, W. David. “Standard Form Contracts and Democratic Control of Lawmaking Power.” *Harvard Law Review* 84, no. 3 (1971): 529–66.

<sup>20</sup> Hillman, Robert, and Jeffrey Rachlinski. “Standard-Form Contracting in the Electronic Age.” *Cornell Law Faculty Publications*, May 1, 2002.

<sup>21</sup> Rakoff, Todd D. “Contracts of Adhesion: An Essay in Reconstruction.” *Harvard Law Review* 96, no. 6 (1983): 1173–1284.

<sup>22</sup> *Supra note*, at 12.

the market as it engages on daily basis with the same type of the transaction.<sup>23</sup> Fourth, the process of negotiation is almost absent before the consumer's acceptance. Fifth, enterprises were granted the right to set the rules and consumers had no alternative either to "take it or leave it" as the case was in the insurance and banking sectors. Sixth, the consumer is inexperienced with this type of transaction compared to the businesses' practice. Lastly, the main obligation on the consumer is the payment of the selling price. In that sense, the consumer contract is called contracts of adhesion as the consumers have no other option but to adhere to it without proper knowledge of its substance.<sup>24</sup>As a result, the problem of standardization of contract lies in its deviation from the classic dogma of contract.<sup>25</sup>

From the business' point of view, SFC is a tool to maintain its profitability and risk control. This shift in practice provided the opportunity to reduce the cost of negotiation and bargaining which is reflected in lower sales prices. Accordingly, business enterprises used the same form of contracts for their products to reduce the transaction cost of negotiation and bargaining in addition to adopting the same terms and conditions across the same industry.<sup>26</sup> In other words, standardization entailed two types; one related to the same form from the company such as Amazon contracts for its different products and the other is the adoption of different enterprises for the same standard contract in the same industry as the terms of use provided by Google and Yahoo.<sup>27</sup> In the consumer's perception, SFC includes rigid terms and conditions, which are assumed to be of low probability of occurrence in real life. So, consumers care more about the brand and the reputation of the enterprise than the terms and conditions; for instance, when the customer believes the company to behave more generously toward consumers than the actual contract's terms.<sup>28</sup>Rakoff describes the

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<sup>23</sup> *Supra note*, at 21.

<sup>24</sup> Diane W. Savage, *The Impact of Proposed Article 2B of the Uniform form Commercial Code On Consumer Contracts for Information and Computer Software*, 9 *LoY. CONSUMER L. REP.* 251, 254 (1997). "The term 'adhesion' was imported from European legal scholars. It was adapted from the lexicon of international law where treaties were often negotiated by a group of states and left for 'adhesion' by other states, not involved in the negotiation of the treaty terms, who could then choose to accept or reject the treaty as drawn."

<sup>25</sup> *Supra note*, at 12.

<sup>26</sup> *Supra note*, at 20.

<sup>27</sup> Fairfield, Joshua A T. "The Cost of Consent: Optimal Standardization in the Law of Contract." *EMORY LAW JOURNAL* 58 (n.d.): 59.

<sup>28</sup> Barnes, Wayne R. "Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)." *Washington Law Review* 82 (2007): 49.

consumers' behavior towards SFC as "[t]he consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated".<sup>29</sup> To conclude, the perceived inequality in economic and bargaining power between businesses and consumers proved to be a real phenomenon in the legal and economic literature.<sup>30</sup> Nonetheless, SFC derives its legitimacy from the business efficiency justifications as it represents indispensable economic phenomena.

SFC has persisted to be the convenient device to conduct e-commerce in the online contracting environment since the 1980s. However, some technological amendments have been incorporated into this mode of contracting to generate more complicated results on contract formation and enforcement.<sup>31</sup> Still, the e-consumer contract is classified as a type of commercial contract under the application of general rules of contract law. Although they are titled differently,<sup>32</sup> B2C contract is the digital form of adhesion contract as they inherited the same characteristics.<sup>33</sup>

The e-contract is not abusive by the power of its standard form; instead by the power of the stronger party that may use it opportunistically.<sup>34</sup> This is to confirm that not all SFC is unfair. The standard form of e-contract can promote knowledge and ease of use, reduce uncertainty, and lower transaction costs for all parties.<sup>35</sup> In fact, it facilitates the commercial transactions and the court's interpretations of clauses included in SFC as the case of banking and insurance contracts. Generally, it is even beneficial when a fair set of terms are included in SFC and then adopted widely by the industry. In that sense, it will become the norm and set the standard for good contractual practices. The problems of e-contract arise from the unfair practices of business fostered by the online environment that

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<sup>29</sup> *Supra note*, at 21.

<sup>30</sup> *Supra note*, at 12.

<sup>31</sup> *Supra note*, at 6. The enforcement complexity is related to the interpretation of SFC in adjudicatory process as if they are subject to the general contract law while their nature is different.

<sup>32</sup> *Supra note*, at 7.

<sup>33</sup> Podlas, Kimberlianne. "Let the Business Beware: Click-Wrap Agreements in International B2C E-Commerce." *Journal of Law & Business* 8 (2001): 38–50.

<sup>34</sup> *Supra note*, at 12.

<sup>35</sup> *Supra note*, at 6.

is of technological and cross-border nature. The technological aspect of E-contract entails an imbalance between the contracting parties that may result in price discrimination based on an unauthorized collection of personal data from the consumer's online activity.<sup>36</sup> While the cross-border nature of E-contract involves an absence of face-to-face communication and lack of direct supervisory authority to deter any unfair contractual behavior.

## 2. Theoretical Framework of Contract

The E-contract conceptualization is subject to different social and economic considerations that entail examining the theory of contract law. It generates complex difficulties in enforcement. The paradox is that the legal interpretation of e-contract may result in two extreme views; either the entire contract is valid and enforceable because the contract formalities including offer and acceptance were satisfied, or the contract terms are invalid and unenforceable because of the absence of bargaining and informative consent.<sup>37</sup> In light of the indispensable use of SFC, scholars developed positions in favor of and against its application. Professor Karl Llewellyn introduced the concept of “blanket assent” where the point is not assenting to each term; but rather “the broad type of the transaction”.<sup>38</sup> By the term “blanket assent”, Llewellyn refers to assenting to the whole context of the transaction.<sup>39</sup> In other words, the contract is considered to be a part of the product price which results in higher prices if the cost of negotiation will be added to the deal. Friedrich Kessler explains the purpose of contracts of adhesion as “they provide substantial savings for sellers selling large volumes of goods under uniform terms and so presumably benefit everyone, but that they also permit monopolists to exert and extend their monopoly powers.”<sup>40</sup> In Kessler’s point of view along with other scholars, an adhesion contract is a tool designed by the business that may result in adverse effects on the consumer welfare, which raises the argument for the tradeoff between its economic advantages and consumer welfare. So, the classic notion of freedom of contract entails that “the contract shall be

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<sup>36</sup> R. Weiss and A. Mehrotra, Online Dynamic Pricing: Efficiency, Equity and the Future of E-Commerce, 6 Virginia Journal of Law and Technology (2001),

<sup>37</sup> *Supra note*, at 28.

<sup>38</sup> K. Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960). As Cited In Slawson, W. David. “The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms.” *University of Pittsburgh Law Review* 46, no. 1 (1985 1984): 21–74.

<sup>39</sup> *Id.*

<sup>40</sup> Kessler, Contracts of Adhesion-Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629 (1943)

enforced as if they were ordinary, negotiated agreements, and tailored by the parties even though they fit the literal definition of contracts of adhesion.”<sup>41</sup>

A brief review of the transition of the contract theory will follow to grasp the main dimension of the problem. The relevancy of the upcoming section relies on two points. First, it demonstrates that the current problem of e-contract preexists in the evolution of contract law as it is concerned with the different positions theorizing the limitation imposed on the freedom of the parties and the appropriate regulatory mechanism to reach substantive fairness of the transaction. Secondly, it provides us with the methodological lens through which the problem of balancing the conflicting interests of e-contract will be examined.

For simplification purposes, I shall divide the theory of contract law into two schools.<sup>42</sup>The classical school was designed and promoted by Langdell, Holmes, and Williston. It included the roots of the private sphere, freedom of contract, “laissez-faire”, and non-judicial intervention.<sup>43</sup> The classic notion emphasized the enforcement of intent of contracting parties regardless of the outcome, for example, slavery contracts.<sup>44</sup> The contract is perceived as a rigid instrument that employs formal and deductive reasoning.<sup>45</sup>In the view of individual property rights as the essence of private law, it seems just to enforce private arrangements without much concern to the fairness and justice of the outcome.<sup>46</sup> Additionally, the understanding of the “laissez-faire” is that state interference shall be minimized as possible for the economic benefits of the freedom of exchange and individual satisfaction.<sup>47</sup> So, it was of public interest to strictly enforce the private contracts.<sup>48</sup>

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<sup>41</sup> Schwartz, Andrew. “Consumer Contract Exchanges and the Problem of Adhesion.” *Yale Journal on Regulation*, January 1, 2011.

<sup>42</sup> Holmes, Eric M. “Is There Life After Gilmore’s Death of Contract-Inductions from a Study of Commercial Good Faith in First-Party Insurance Contracts.” *Cornell Law Review* 65, no. 3 (80 1979): 330–89.

<sup>43</sup>*Id.*

<sup>44</sup> Holmes, The Path of the Law, 10 HARV. L. REV. 457, 462 (1897).

<sup>45</sup> Eisenberg, Melvin A. *The Objective and Coverage of This Book; Doctrinal and Social Propositions; Social and Critical Morality; Terminology; and the Tenor of the Footnote Apparatus. Foundational Principles of Contract Law*. Oxford University Press.

<sup>46</sup> Costigan, George P. “Implied-in-Fact Contracts and Mutual Assent.” *Harvard Law Review* 33, no. 3 (1920): 376–400.

<sup>47</sup> Hale, Robert L. “Coercion and Distribution in a Supposedly Non-Coercive State.” *Political Science Quarterly* 38, no. 3 (1923): 470–94.

<sup>48</sup> *Supra note*, at 12.

While the realist school started by the rise of the side effects of the free contract affecting third parties.<sup>49</sup> Said effects were called “ externalities” which changed the reasoning toward contract law at that time.<sup>50</sup> In other words, the consciousness toward the social cost of private agreements affected the enforcement of contract law.<sup>51</sup> So, the foundations of creating legal rules were changed to reflect policy choices such as the policy to protect the interests of the contracting parties instead of protecting the freedom of the parties. This phase includes the critical legal studies of contract law to bring the social and economic ideology from the shadows of contract law. Additionally, it illustrates the economists’ influence on creating laws as Alan Schwartz argued for the economic efficiency of the enforcement of the contract. So, rational justifications for the interference with the principle of private autonomy were promoted for other substantive objectives. Several debates by scholars reimaged the actual nature of contract law and the implied conception of its formation and enforcement. This stage of legal reasoning developed the move toward the protection of a specific class of contracting parties and the expansion of defensive principles such as economic duress, mistake, and undue influence to impose a limitation on the principle of private autonomy.

#### B. The Conflicting Consideration Model

Duncan Kennedy is accredited for narrating the transition and the previous steps in the theory of contract.<sup>52</sup> In the last 50 years, reconstruction projects were created ranging from the conservative projects based on efficiency, morals, and rights to the extreme liberal passing through critical legal studies. In 1941, Fuller conducted a policy analysis on the contract with a focus on the role of consideration in the validity of the contract. He explained that every rule is designed to serve a certain social function using the conflicting consideration model reflecting the conflict between the formal and substantive functional roles of the consideration doctrine. In his article, he saved ‘the baby’ instead of ‘throwing the baby with the bathwater’ by downgrading the will theory from being the only base of

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<sup>49</sup> *Supra note*, at 15.

<sup>50</sup> *Id.*

<sup>51</sup> Coase, R H, and University of Virginia. “The Problem of Social Cost.” *THE JOURNAL OF LAW AND ECONOMICS*, n.d., 44.

<sup>52</sup> Kennedy, Duncan. “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form.’” *Columbia Law Review* 100 (January 1, 2000).



contract law to the principle of private autonomy in conflict with other types of considerations of the same level.<sup>53</sup> In 2000, Kennedy built up over Fuller's work of contract analysis which highlighted that "the principle of private autonomy is first among equals" using a critical perspective. The difference between Fuller and Kennedy approaches in applying the conflicting consideration model is that Fuller was silent with regards to the political dimension of the legal discourse. While Kennedy highlighted the political dimension as major part of the available ideological choices under the umbrella of conflicting consideration model. As Fuller originated this scheme of contract analysis, Kennedy's approach of policy analysis revealed the contextual influence of how judges present their solutions to contract questions by dressing up their choices that are pinned on privileging political, economic, and social values. By that project, the real parameters that shape the legal reasoning of contract law were unveiled as the case turned not to be just based on rules. He gave a complete picture of the contract competing factors including substantive considerations (individual rights) in conflict with the technical rules of legal formality. Said inherited conflict is part of the analysis conducted on contract law along with the choice of competent legal institution to undertake that regulatory responsibilities. In that manner, a new mode of thinking is developed to look at the contract called the conflicting consideration model. The considerations are described as "not ideological, meaning that they are universal, or are considerations whose achievement or avoidance are of concern to all".<sup>54</sup> Moreover, the considerations are different and conflict with different forces depending on the situation. Kennedy elaborated on the considerations' forces by saying "along a continuum of closely related typical fact situations, different considerations will be marginally stronger or weaker, as we move from the strongest case for one party to the strongest case for the other by marginally adjusting the details of conduct and setting."<sup>55</sup> Further, the legal solutions to any problem are placed on a continuum that ranges all the possible solutions. So, the selection from the possibilities is based on the maximization of the conflicting consideration and serving as much as possible of the desirable social functions. The model explains that contract enforcement is not a mathematical equation based on neutral rules, but rather a choice in light of conflicting considerations. These

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<sup>53</sup> Fuller, Lon L. "Consideration and Form." *Columbia Law Review* 41, no. 5 (1941): 799–824.

<sup>54</sup> *Supra note*, at 52.

<sup>55</sup> *Id.*

considerations are classified into three types which are formal, substantive, and institutional. The conflict includes formal arguments which are the choice of the appropriateness of rules and standards to regulate the legal problem. Secondly, the substantive considerations consist of the rights, morality, and efficiency arguments that act as the rationale behind formulating the structure of the regulatory model. While the third legal consideration is the institutional competence of legislators, administrators, courts, and business enterprises to perform the regulatory tasks in light of the separation of powers and policymaking.

Ultimately, the conflicting considerations model can be easily covered by the shadow of ideology and being politicized which is one of Kennedy's main arguments. Kennedy described the model as a “vehicle for ideology” to serve any type of political policy. The re-politicization of contracts provides a more adequate assessment of the basis of contract regulation. In that sense, lawmakers shield the political dimension of the contractual domain under different normative models such as rights, law, and economics, democracy, or even equality which resembles the cover used to limit party autonomy to protect social objectives.<sup>56</sup> On that note, the difference between Fuller and Kennedy's way of executing the model became evident. Each approach of execution within its historical context contributed massively to develop different perspectives of policy analysis of contract law. In that respect, the social value of reliance is promoted while putting the social justice and economic efficiency discourse at stake within the contractual domain. The ideological character of the contractual regulations is implied in the choice of the conflicting considerations.

As I understood, contract regulation is a compromise of the involved conflicting considerations. Hence, the model includes a grid of formal and substantive considerations that shall be applied when conducting policy analysis. In Kennedy's way of analysis, he brought internal and external considerations that are conflicting with the principle of private autonomy to the idea of contract. Kennedy added to Fuller's analysis that there is a built-in inherent conflict of considerations rather than a problem of harmonizing the goals of the formalities.<sup>57</sup> He highlighted the legitimacy of this particular choice presented as a

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<sup>56</sup> *Id.*

<sup>57</sup> *Supra note*, at 53.

correct legal answer while it is, in essence, a tradeoff between the conflicting considerations. By that model, the classical legal reasoning was set aside despite its current existence in courts which visualizes contract enforcement as a process of reaching correct answers through analysis of rules and deduction from precedents. Kennedy introduced the social dimension as substantive conflicting consideration besides private autonomy to complete the conflicting consideration model. So, the social engineering resulted from the contract regulation and the distributional consequences are goals that laws and projects are aimed at. While the results of those projects come contrary to the desired objectives because of privileging other considerations over those substantive objectives. Thus, the conflicting consideration model resulted from the built-in conflict within each type of consideration and the conflicts between the different types of consideration. Accordingly, the array of solutions is a relative compromise of the conflicting considerations. In that sense, any legal solution may be analyzed within the framework of the conflicting considerations.

To conclude, this model serves as guidance to the administration of justice as it highlights the structural conflict within any legal problem. The compromise between the different considerations is the choice of the decisionmaker at the cost of other factors (for example, the enforcement of e-contract reduces the transactional cost at the cost of abandoning consumer rights to access remedy). Accordingly, the basis of contractual governance implies governance of contract whether by legislation, judicial law-making, standard-setting, or private practice.<sup>58</sup> This framework facilitates the identification of the tools used in e-contract regulation because the considerations' typology plays a key role in mapping the scheme of the regulatory tools of e-contract. By that, I mean the conflicting consideration model is a system for classification and technique of understanding the movable essentials of regulation. The idea is that we are trying to increase the level of protection of E-consumers, so this model facilitates mapping the number of options to act upon and the consequence of each route. It represents the tool to see the social output when we select a specific regulatory model. For these reasons, I am going to use the conflicting

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<sup>58</sup> Zumbansen, Peter. "The Law of Society: Governance Through Contract." *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, n.d., 45.

consideration model to present series of mechanisms that address the imbalance of the e-contract.

### C. The Conflicting Considerations of the E-contract

The conflicting consideration is the different modes of legal arguments to understand the moving parts of a legal problem. Contract law is an interesting area of law, where the formal requirements pull the social outcome into one direction while the social objectives require various methods to its achievement. In other words, the structure of the regulatory model may constrain the accomplishment of significant substantive objectives; whereas these substantive objectives are so important that demand other methods (formal or institutional) to step in and ensure its fulfillment. In general, this framework is a method to collect and nest the legal arguments for any legal problem into the typology of formal, substantive, and institutional considerations. This typology represents the instruments used for regulating a legal problem and designing any legal solution. After laying out the foundational reasoning of contract theory, this section examines the three types of considerations in relation to contracts to demonstrate the tension between the regulatory choices.<sup>59</sup>

#### 1. Formal Considerations

According to the model, ‘formal considerations’ are concerned with “the choice between rules and standards of greater or less generality, arranged in rule/exception or rule/counter-rule configurations.”<sup>60</sup> In other words, the formal considerations refer to the structure of the regulatory model in terms of general laws or special ones. It may be represented by the choice of the general law to be applied for all contracts or to opt to have special legislation to regulate a certain area of the contract. The benefit of this model lies in illustrating the different scenarios that result from the legislator approach to address the problem. Thus, the formal considerations are related to the appropriateness of the use of rules or standards for regulating a legal problem. I understand rules as "legal precept attaching a definite detailed legal consequence to a definite detailed state of fact."<sup>61</sup> I understand standards as direct “reference to one of the substantive objectives of the legal order; for example, good

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<sup>59</sup> *Supra note*, at 52.

<sup>60</sup> *Supra note*, at 52.

<sup>61</sup> Friedman, Lawrence M. “Law, Rules, and the Interpretation of Written Documents.” *Northwestern University Law Review* 59, no. 6 (1965 1964): 751–80.

faith, due care, fairness, rights, and reasonableness.”<sup>62</sup> The formal instruments seem distinct and clear in theory; however, their application is complicated because the main challenge is the fitting of those ‘formalities’ to serve the desired objectives.

On the one hand, the legislator designs rule in an abstract form of wide administrability. General law application entails a high margin of judicial appreciation which may lead to uncertainty and unpredictability of the outcome for both contracting parties. For example, the contract law in the USA is an example of the general law model. Contract law is governed by the Uniform Commercial Code (U.C.C.) and case law.<sup>63</sup> The case law does not stipulate consistent grounds for rulings. The two cases of *ProCD, Inc. v. Zeidenberg* and *Leonard v. PepsiCo* may demonstrate the inconsistency of the ruling’s grounds. In *ProCD, Inc. v. Zeidenberg*, a simple “click” constitutes an acceptance of an offer based on the doctrinal basis of “sufficient notice” and “duty to read”.<sup>64</sup> The offer was presented in the form of exterior packaging advising consumers that the contents were subject to a license and a printed user's guide in the item's box stating both that the consumer's use of the program constituted acceptance of the license agreement and that the license was for personal use only.<sup>65</sup> During the installation process, the program supplied a "pop up" screen notifying the user of the majority of these terms and requiring a ‘click’ to both acknowledge these terms and to proceed to use of the program. The court decided that this process of offer and acceptance comply with the court’s formal requirements of the contract. Although Zeidenberg argued that the license restriction was not part of the sale, the court viewed that this process of notification and acceptance to use the software after full payment follows the formal requirements to validate the contract’s legal agreement. The formal structure of the law in the USA provides the unconscionability doctrine as a safeguard to be applied for standard contracts to guarantee that an individual’s consent involves understanding of the content and voluntary manifestations.<sup>66</sup> Nonetheless, it was not applied to this case according to the court's review of the context and circumstances of the case. Meanwhile, in *Leonard v. PepsiCo*, detailed advertising of exchange of bonus points didn’t qualify to

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<sup>62</sup> *Id.*

<sup>63</sup> U.C.C. Article 2 (sales)

<sup>64</sup> “ProCD Inc. v. Zeidenberg (Bitlaw).” Accessed March 20, 2021.

<sup>65</sup> *Id.* personal use indicates that the program could not be copied to a second computer or used in a networked environment.

<sup>66</sup> Dawson, Economic Duress-An Essay in Perspective 45 MICH. L. REV. 253 (1947)

fulfill the formal requirement of an offer to contract.<sup>67</sup> The Pepsi case is based on commercial advertising that offers the exchange of the points, which are collected by the purchase of Pepsi drink products, in return for merchandise. Said merchandise includes sunglasses (175 points), a leather jacket (1450 points), and a military Harrier jet (7,000,000 points). Leonard collected the points and claimed to receive the harrier jet, but Pepsi refused based on their claim that they are not legally bound to deliver the jet.<sup>68</sup> So, the question of whether the commercial advertising was an offer was raised and the court decided that it was not a contract offer emphasizing it was only an invitation to negotiate; rather than to contract.<sup>69</sup> The two cases demonstrate a blurry view of what constitutes offer and acceptance.<sup>70</sup> Actually, it raises several loopholes concerning what constitutes consumer rights compared to the understating in the special legislation regimes for example in European Union (EU).

On the other hand, the EU member states follow a substantive legislative model, which is based on privileging standards in the form of consumer protection rules. EU creates special consumer protection legislation that deals with consumer sales, unfair contract terms, unfair commercial practices, and consumer rights.<sup>71</sup> It restricts certain practices and the imposition of certain provisions as part of its substantive legislations. Under the EU policy of direct exclusion of certain terms, there are legislations enacted to protect the consumers from the biased terms that are embedded in the contract through providing a list of standard terms that are considered unfair terms in the consumer contracts.<sup>72</sup> For example, Apple was found to have breached certain provisions of EU consumer law that are concerned with

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<sup>67</sup> Leonard v. PepsiCo, 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999)

<sup>68</sup> *Id.* Leonard did not actually drink the millions of Pepsis required to obtain the points. Rather, he discovered that Pepsi would sell the points for 10 cents each and submitted a check for approximately \$700,000 to buy the points and redeem them for a Harrier jet.

<sup>69</sup> *Supra note*, at 28.

<sup>70</sup> U.C.C., Article 2-206 Unless otherwise unambiguously indicated by the language or circumstances” an offer to make a **contract** shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances” and acceptance is “Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.”

<sup>71</sup> Directive 1999/44/EC on consumer sales, Directive 93/13/EEC on unfair contract terms, Directive 2005/29/EC on unfair commercial practices, and Directive 2011/83/EU on consumer rights.

<sup>72</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Pub. L. No. 31993L0013, OJ L 095 (1993).

the issues of legal and commercial guarantee and the fairness of commercial practices and contract terms.<sup>73</sup> The claim of misleading practices was raised concerning consumers' product guarantee rights. This case demonstrates the extent of obligations imposed on businesses to respect consumer rights which took place in fourteen EU member states and resulted in the modification of Apple's terms of use to meet the EU standards.

Thus, the two regulatory models are the two facets of the same coin of contract regulation. Both approaches serve legitimate objectives; however, each model produces different consequences. In the USA model, the contracting parties had to resort to other alternatives to guarantee the certainty and predictability of the contract.<sup>74</sup> The business started to include a private mechanism to avoid the hassle of the court. For example, the inclusion of pre-dispute arbitration provisions leads to the dominance of the privatization of the dispute resolution mechanism for example dispute resolution in Amazon.com.<sup>75</sup> Moreover, the USA courts rule for strict enforcement of Arbitration clauses.<sup>76</sup> In that sense, courts stress the formalities in enforcing the contract disregarding the associated consequences of enforcing certain provisions and motivating business firms to adopt such terms.<sup>77</sup> In contrast, the EC directive on unfair terms considers the arbitration of consumer disputes as an unfair provision. Thus, the arbitrability of disputes in the EU is deemed 'prima facie' invalid as per Annex 1[q] of EU Directive 13/93.<sup>78</sup> Additionally, The European Court of Justice ruled in *Mostaza Claro v. Centro Movil Milenium* that courts should examine the validity of arbitration clauses in B2C contracts, even after the completion of arbitration procedures.<sup>79</sup> This different legal structure demonstrates how certain practices are perceived as part of business freedom or consumer rights. This contrast does not suggest the supremacy of one system over the other. Nonetheless, it shows how different regulatory choices may shape the understanding of different social costs and legal elements in contract law and dispute resolution. In short, the USA model, which is based on general and case

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<sup>73</sup> Durovic, Mateja. "The Apple Case Today: Factual and Legal Assessment." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2016.

<sup>74</sup> Schmitz, Amy J. "Access to Consumer Remedies in the Squeaky Wheel System." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, March 19, 2012.

<sup>75</sup> <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM> last accessed 4.4.2021

<sup>76</sup> *Supra note*, at 73.

<sup>77</sup> Nancy S. Kim, Two Alternate Visions of Contract Law in 2025, 52 DUQ. L. REV. 303 (2014).

<sup>78</sup> Council Directive 93/13/EEC [1993] OJ L95/34.

<sup>79</sup> Case C-168/05 *Mostaza Claro v. Centro Movil Milenium* [2006] ECLI I-10421.

law, is deemed to have the following consequences: 1) undermine the enforcement of consumer protection and statutory rights; 2) maximize the savings from transaction cost; 3) privatize contract lawmaking and enforcement. Meanwhile, The EU model, which is based on protective rules, results in 1) privilege consumer rights; 2) restrict party autonomy; 3) reinforce public power in enforcement. Each approach represents the maximization of a choice at the cost of other considerations. Still, both legal structures are legitimate options.

The application of the formal tools may result in different social output as illustrated above. There is no legal system able to canvas a coherent system to cope with the problem of 'formalities.' One may conclude that the adherence to formal considerations implies risks on other substantive and institutional considerations. The complexity of formal considerations in the law of contract lies:

“in terms of the formulation and application of an existing rule. Formalities are premised on the lawmaker's indifference as to which number of alternative relationships the parties decide to enter. Their purpose is to make sure, first, that the parties know what they are doing, and second, that the judge will know what they did.”<sup>80</sup>

In other words, this complexity suggests the adoption of different types of legal forms to meet the particular substantive consideration; for example, the adaptation of standards in form of substantive legislation or even different institution to take over the law enforcement. In short, we have examined two approaches to the formal structure of contract law that result in privileging specific substantive consideration over others. So, we shall turn to the substantive considerations that shape the rationale of the regulatory model.

## 2. Substantive Considerations

Substantive considerations include “conflicting utilitarian or welfarist considerations, conflicting moral principles, and conflicting rights involved in the lawmaking process.”<sup>81</sup>

Substantive considerations are used to explain and characterize the party behavior in

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<sup>80</sup> Friedman, Lawrence M. “Law, Rules, and the Interpretation of Written Documents.” *Northwestern University Law Review* 59, no. 6 (1965 1964): 751–80.

<sup>81</sup> Kennedy, Duncan. “A Semiotics of Legal Argument Symposium: Law and Economics and the Semiotic Process.” *Syracuse Law Review* 42, no. 1 (1991): 75–116.



relation to the proposed rule.<sup>82</sup> It represents the theoretical foundation behind legalization. The substantive arguments, “in terms of their sources in general political and ethical discourse, are based on morality, rights, social welfare or community expectations.”<sup>83</sup> So, the desired outcome of the regulatory choice shall be fairness, protection of rights, and public welfare. It encompasses the substantive rationales for the state to restrict the right of freedom of contract and actually privilege other substantive goals such as social, public, private, cultural values based on ideological motives. The privileges of the substantive considerations can be deemed to have particular consequences. The justification of the legislator depends on the compromise between different substantive considerations. At the outset, each social outcome seems like the right objective that is worth protecting; but there is inherited conflict within each substantive objective.

The substantive considerations may be framed as the right to freedom of contract and the state paternalistic right to limit the freedom of contract for public interests. The notion that individuals and business firms ought to exercise freedom of choice as a given right raises conflict of interests within the contract domain. Each party is empowered to choose for their best interest. This reveals two conflicts embedded in the contract domain which are the consumer right to choose and trade for their best interests and the consumer right to be protected; the other conflict is the business's freedom to contract and state role to restrict that freedom for the public interest. Consequently, the restrictions imposed on freedom of contract may deter the opportunistic behavior of the business firms while the consumer protection measures may result in consumer careless behavior towards the transaction.<sup>84</sup> So, the consequences of both concepts raise the conflict of considerations.

On the one hand, freedom of contract (party autonomy) is the fundamental principle of the law of contract. The contract belongs to the private sphere where parties have the power to consent to the agreement to render its validity and enforceability and the state is not allowed to intervene to ensure the transaction security and certainty. The private transaction stems

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Kennedy, Duncan. “The Political Stakes in ‘Merely Technical’ Issues of Contract Law,” n.d., 22. (consumer careless behavior refer to the irrational activities in the domain of contracting capitalizing on the protective rules to be the leeway to avoid contractual responsibilities).

its power from the freedom of its parties.<sup>85</sup> In this regard, the general notion of “pacta sunt servanda” is applicable in commercial matters as in the case of consumer contracts implying the notion of interpreting the strict meaning of the terms of the contracts. The notion of freedom of contract presupposed that the parties are on equal footing and have the freedom of choice. So, any governmental restriction of the principle of party autonomy is criticized for interference and limiting individual freedom and autonomy. In that context, any interference with this right should be well evaluated. The protection of party autonomy conforms with the economic scholars advocating freedom of contract based on the “laissez-faire” theory which argues that an effectively competitive market leads to a perfect market, rejecting any need for policing measures.<sup>86</sup> The argument for preserving party autonomy lies in that the free exchange of products and services will correct the market spontaneously as there will be other available alternatives for the consumer to choose from which assumes rational consumer behavior to read and compare the terms of the contract and select the best contract that meets their interest. Said argument neglect the fact that a perfectly competitive market is theoretically-based rather than a realistic situation.<sup>87</sup>

On the other hand, there are other substantive rationales based on rights and economics that are worth protecting which are consumer rights and economic efficiency. First, consumer welfare is worth protection because consumers may be disadvantaged by the power of SFC. The idea of consumer protection developed in response to industrialization and the growth of mass production, consumer goods, and services in the marketplace since the 1960s.<sup>88</sup> The social consciousness towards the perceived injustices towards consumers from the contractual agreement led to activism seeking protective laws.<sup>89</sup> The term “consumer” means “every natural or juristic person to whom a product is offered to satisfy non-professional or non-commercial needs.”<sup>90</sup> The notion of consumer rights invokes safeguarding the consumer interests from marketplace risks including the safety of

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<sup>85</sup> *Supra note*, at 52.

<sup>86</sup> *Id.*

<sup>87</sup> *Supra note*, at 15.

<sup>88</sup> *Supra note*, at 1.(The call for consumer protection was introduced by president John F. Kennedy in 1962 in his speech to United states congress highlighting four basic rights which are; right to safety, right to information, right to choose and right to be heard).

<sup>89</sup> “the economic position being one of weakness in comparison with the sellers by reason of the fact that they are private final consumers and are not engaged, when buying the product acquired on installment credit terms, in trade or professional activities.” See Case 150/77 Bernard v Ott, [1978] ECR 1431, para 21.

<sup>90</sup> Consumer Protection Law No. 181/2018, article (1).

products, unfair practices, imbalances in information, and bargaining power.<sup>91</sup> The nature of consumer rights is twofold; one is considered as an expansion of recognized economic rights that may qualify to human rights and the second is related to the obligations in contract law.<sup>92</sup> The first fold of consumer rights views the protection of the individual consumer as part of maintaining human dignity; especially against multinational corporations and their unfair market practices including monopolies and cartels. This perception serves as the ground for creating domestic and regional laws and regulations to protect consumers' interests. Additionally, consumer rights are associated with their entitlements over possessions (financial contribution/spending power); hence it is fair to consider consumer rights under the general banner of property rights.<sup>93</sup> While the other fold results from the private obligations arising from contracts between consumers and business.<sup>94</sup> In this manner, the idea of consumer protection is preserved through protecting consumer's property and contractual rights.<sup>95</sup> Consequently, the cost of preserving the right of free contracting is consumer protection which requires the state to interfere by direct intervention, by delegation, or by adjudication to restore the social ordering of the society.

The objective of consumer protection reflects the distributional and corrective justices' responsibility imposed on the state. First, the distributional justice entails state regulation to redistribute the risks and income; in addition to modifying contractual terms to benefit disadvantaged consumers to reach fair distribution ends.<sup>96</sup> The second goal of corrective justice entails the protection of property rights and entitlements. While each consumer may have individual interests and characteristics, all consumers, from the regulatory point of view, maybe seen as belonging to the same class of natural or legal persons, and as sharing a common need to zero risks of abuse of their property rights. These risks include information asymmetries, the discrepancy in bargaining power, and social behavior

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<sup>91</sup> "United Nations Guidelines for Consumer Protection" (2015). Consumer Protection (A/RES/70/186). Resolution adopted by the General Assembly on 22 December 2015

<sup>92</sup> Deutch, Sinai. "Are Consumer Rights Human Rights?" *Osgoode Hall Law Journal* 32, no. 3 (July 1, 1994): 537-78.

<sup>93</sup> *Id.*

<sup>94</sup> Ilias Bantekas, Consumer Rights as Human Rights, 1 Cyprus HUM. Rts. L. REV. 184 (2012).

<sup>95</sup> *Supra note*, at 90. UN Guidelines for Consumer Protection (UNGCPs) was adopted in 1985 and expanded in 2015 to include the following rights: right to choose, right to safety, right to be heard, right to information, right to consumer education, right to satisfy the basic needs, right to quality, right to redress.

<sup>96</sup> Hale, Robert L. "Coercion and Distribution in a Supposedly Non-Coercive State." *Political Science Quarterly* 38, no. 3 (1923): 470-94.

pressure. The general sense is that the regulatory framework that governs contracts must ensure that such asymmetries are smoothed to the effect that, on the one hand, do not unacceptably infringe individual rights; while, on the other hand, they do not unacceptably obstruct the transaction employing disproportionate costs. Overall, the conflicting considerations regarding the E-contract can be depicted as attaining the party autonomy (transactional certainty and static security) or consumer protection ( transactional fairness and Dynamic security).<sup>97</sup> The consumer's dynamic security involves the right to a fair and honest deal; while the business's static security involves the right not to be stripped of their property without fault from his side.<sup>98</sup> In both scenarios, the choice seems morally driven.<sup>99</sup> The case of Adobe. Inc is an example of the controversy which is found in the two justification; first that the contract is formed and should be completed as I clicked "I accept" to protect the transaction certainty; and second that the deal is unfair because of the misleading offer as it promoted free trial while in fact, it was a one-year contract; and accordingly, the contract shall be rendered invalid to protect the transactional fairness. In the first case, the transaction is perceived as certain and predictable, and the business rights are protected by the virtue of objective fulfillment of contract validity (part autonomy) at the cost of a fair deal to the consumer (consumer rights). In the second case, the consumer right to a fair deal was preserved at the cost of the certainty of the transaction. Also, in the second case, it may be assumed that this scope of protection may result in consumer opportunistic conduct to avoid their obligations.

Secondly, the consideration of economic efficiency is derived from the state's paternalistic responsibility to correct market failures.<sup>100</sup> The diagnosis of the source of failures in the market is essential for the state to respond effectively to such inefficiencies. For instance, the two claimed problems in E-contract are inadequate information. The information failures require the intervention to remedy the informational deficiency and transactional cost. The mechanism used may take the form of information forcing rules including

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<sup>97</sup> *Supra note*, at 52.

<sup>98</sup> *Supra note*, at 83.

<sup>99</sup> R. DEMOGUE, 'Analysis of Fundamental Notions', in A. FOUILLÉE et al.. *Modern French Legal Philosophy* 345 (Mrs. Franklin W. Scott & Joseph P Chamberlin trans., 1916).

<sup>100</sup> Ramsay, Iain. "Framework for Regulation of the Consumer Marketplace." *Journal of Consumer Policy* 8, no. 4 (December 1, 1985): 353-72.

clarification of hidden costs, false advertising, and any necessary information about the product or service.<sup>101</sup> However, such entitlements may have adverse effects on the cost of information and accordingly reflected in higher transaction cost because the transaction costs include search and information costs; bargaining and decision costs; policing and enforcement costs.<sup>102</sup> Secondly, the practice of SFC to reduce the cost of the transaction by limiting time and cost of negotiation<sup>103</sup>. Otherwise, Economic theorists suggest that businesses will transfer contract litigation costs to consumers through higher selling prices or lower quality of goods and services.<sup>104</sup> So, the transactional cost of an E-contract plays a key factor as corporations have the upper hand and expertise in drafting this type of contract to their advantage to ensure a smooth flow of operations without considering the consumer's rights. Said unfair terms include waiver of rights, unilateral amendment provisions, and restriction on collective lawsuits, which are designed for the business's best interests to reduce the costs and problems of the transaction.<sup>105</sup> They even limit their dispute resolution forum in order not to account for it in their financial reporting by minimizing the volume of judicial claims. This suggests the immorality imposed by enterprises in contract formation to ensure the certainty of the transaction that serves their best interest.<sup>106</sup>

The discussion on substantive considerations shows the tension between party autonomy and social and economic considerations, which is the key element in shaping the form of legislation. Here comes the role of the conflict between institutions to take over the power of regulation and enforcement.

### 3. Institutional Considerations

The institutional considerations are the competence of the institutions to perform the necessary regulatory tasks. The conflict entitles the choice between different levels of institutions to regulate and manage a problem. The question of competence and

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<sup>101</sup> *Supra note*, at 27.

<sup>102</sup> *Supra note*, at 99.

<sup>103</sup> Schmitz, Amy J. "Remedy Realities in Business-To- Consumer Contracting." *Arizona Law Review* 58 (n.d.): 49.

<sup>104</sup> *Supra note*, at 20.

<sup>105</sup> Stacy-Ann Elvy, Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond, 44 Hofstra L. REV. 839 (2016).

<sup>106</sup> Luth, H. "Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited," January 1, 2010.

effectiveness of delivering this task is a matter of policy choice in light of the political and economic factors. In other words, the significance of balancing between the rule of law, adjudication, and liberal or radical political theory is the key rationale for appointing the institution. There are four types of institutions that are concerned with the e-contract which are the legislative, the adjudicatory, state-governed institutions, and private institutions.<sup>107</sup> First, the legislative institutions are responsible for law-making. The adjudicatory institutions, for example, courts serve their task of law application and, in some jurisdictions, lawmaking. Third, the state-administrative institutions are appointed to manage and regulate the market; for example, the ombudsmen institutions are entities appointed to investigate the complaints against businesses or governmental bodies as in the case of the Egyptian Consumer Protection Agency. The last type is the private institutions whether business enterprises or privately funded institutions that monitor and deal with contract problems and regulations.

The conflict of institutional consideration lies between the public (State governed entities) and the private entities in the contractual domain of law enforcement. The primary difference is that public enforcement applies to all types of disputes by employing a common body of contract law. The parties comply with its legal rulings because public enforcement is backed by state policing instruments.<sup>108</sup> In contrast, private ordering requires voluntary cooperation by participating businesses and consumers. It applies a set of laws and practices to individuals “who voluntarily subject themselves to such rules, and it provides effective transactional security only because all participating members are committed to adhering to industry rules and complying with private rulings”.<sup>109</sup> For example, commercial arbitration represents a successful private alternative for Business-to-Business (B2B) dispute resolution instead of state courts. So, the conflict arises on who will be more effective/efficient in light of cultural, economic, and social perceptions upon the matter.

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<sup>107</sup> Calliess, Galf-Peter. “The Making of Transnational Contract Law.” *Indiana Journal of Global Legal Studies* 14, no. 2 (2007): 469–83.

<sup>108</sup> Richman, Barak D. “Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering Essay.” *Columbia Law Review* 104, no. 8 (2004): i–2368.

<sup>109</sup> *Id.*

The economic digitalization and globalization that diminished borders in commercial transactions suggest the resort to private order as the competent institution. In that context, "private governance on the transnational plane becomes much more comprehensive, systematic and ubiquitous."<sup>110</sup> This transformation from public to private institutions resulted from the complexity of public tools to serve the business ends. Alternatively, "in circumstances where state law is 'very costly, slow, unreliable, corrupt, weak, or simply absent (lawlessness), parties simply have no choice but to employ private ordering to support otherwise problematic exchanges."<sup>111</sup> For example, the consequence of the USA application of general law on contracts is the privatization of contract law enforcement. Said privatization is backed by the state policy of free market and *laisse-faire* approach towards contract regulation. This gives rise to private regimes that include social sanctions, informal and alternative dispute resolution.<sup>112</sup> Even the EU shifts its regulatory focus from the substantive rights of consumers to the procedural framework for handling B2C conflicts. EU rectified directives on out-of-court dispute resolution which raise the debate on the efficiency of the public enforcement of consumer protection in E-commerce.<sup>113</sup> Controversially, public institutions, in legislations, are entitled to rule over contract claims while, in practice, the market shift to self-regulatory means becomes evident. This legal phenomenon arises from state policy to what best serves its substantive objectives. Thus, the institutional considerations involve the conflict between the competence of state entities or private self-regulatory measures to take over the contract law enforcement.

To conclude this chapter, the first section argues that E-contract is the digital form of contracts of Adhesion. Then, it examined the confliction considerations model to offer a holistic view of the regulatory options and the associated social consequence of the choice of the legal structure. In short, the development of the legal system of contract regulation

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<sup>110</sup> Graf-Peter Calliess et al., Transformations of Commercial Law: New Forms of Legal Certainty for Globalized Exchange Processes?, in Transforming The Golden-Ace Nation State 83, 100 (Stephan Leibfried et al. eds., 2007).

<sup>111</sup> *Supra note*, at 106.

<sup>112</sup> Amitai Aviram, A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems, 22 YALE L. & POL'Y REV. 1 (2004);

<sup>113</sup> Council Directive 2013/11, Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63 (EU); Commission Regulation 524/2013, Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 1 (EU)

involves the balance between formal, substantive, and institutional considerations. So, the chosen approach of regulation represents the compromise between the different types of consideration to serve the state's policy. Having said that, E-contract regulation lurks the question of how to preserve the principle of party autonomy and protect consumer rights. The conflicting considerations demonstrated the tradeoff between the available options to show the extent of the friction that results from the choice of the regulatory model. The preliminary objective of this paper was to balance out the conflicting considerations of the e-contract and create fairness in this type of transaction under the Egyptian regulatory model. In practice, this is impossible in light of the aforementioned analysis of the involved considerations. Instead, the thesis objective is tailored to reduce consumer risks associated with the use of the E-contract without burdening the transaction with extra costs. So, the Egyptian E-contract regulatory model is examined within the context and analytical framework of the conflicting considerations in the next chapter.



### III. E-contract Regulation Regime in Egypt

Egypt is keen to be part of the global digitalized economy through leveraging e-commerce to develop its business landscape and provide portals for regulating the informal economy as part of its 2030 strategy.<sup>114</sup> Egypt is home to more than 103 million consumers with an internet penetration of 57.3%, representing 59.19 million internet users in Egypt by January 2021.<sup>115</sup> This data shows that Egypt has one of the largest bases for prospective E-consumers in the middle east. So, this section examines the legal environment for conducting online shopping. The E-contract is the device by which the e-transaction is conducted and finalized whereby consumer e-transactions are considered of higher risk compared to the traditional B2C transactions because of the associated advanced technology that created a transnational environment.<sup>116</sup> Several consumer e-transactions are characterized by deceptive and unfair practices such as misleading advertisement, products of poor quality, unauthorized use of personal data, and collection of undue fees.<sup>117</sup> Meanwhile, the e-contract is considered to be the digital form of the contracts of adhesion which means that the consumer has no more options than to “take it or leave it”. So, my thesis seeks to maximize the interests of the B2C e-contract parties and increase the level of protection for e-consumer in light of the technological and cross-border nature. This chapter assesses the effectiveness of the B2C e-contract regulation mechanism in Egypt in terms of coping with the advanced information technology and the fast pace of e-commerce with regards to its effect on consumer rights. The following sections argue that the Egyptian regulatory is following a minimalist approach towards E-commerce regulation that privileges the private institutions over the protection of consumer rights. Although the rationale of protecting the weaker party in the contract domain is emphasized in the Egyptian Civil law and consumer protection law, there is no clear vindication for E-consumer’s access to remedy except through the self-regulatory measures that are provided by the private sector. In doing so, the framework of the conflicting consideration set out

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<sup>114</sup> “ICT Policy Review: National E-Commerce Strategy For Egypt,” UNCTAD, 2017.

<sup>115</sup> DataReportal – Global Digital Insights. “Digital in Egypt: All the Statistics You Need in 2021.” Accessed April 5, 2021.

<sup>116</sup> *Supra note*, at 7.

<sup>117</sup> I. Ramsay, *Consumer law and Policy, Text and Materials on Regulating Consumer Markets* 268 (2007).

in chapter 1, which classifies the considerations into formal, substantive, and institutional, will be used to analyze the e-contract regulation.

#### A. Formal Considerations

Formal considerations represent the structure of regulation whether in general or specialized rules.<sup>118</sup> The Egyptian system is structured as follows; A) general rules of the contract along with policing doctrines applicable on all types of contracts inserted in the Egyptian civil law for protecting the parties from abuse of rights; B) specific legislation regarding the E-signature law<sup>119</sup>; C) specific legislation regarding consumer protection law.<sup>120</sup> None of these rules address the particular process of e-commerce with its various types. This part shall examine the Egyptian legislations in turn.

##### 1. Egyptian Civil Code

Contract law is regulated by the Egyptian civil code. The Egyptian civil code acknowledges that the freedom of contract is the essence of its binding force and declares that “*Pacta Sunt Servando*” is the norm of its commercial practice. The contract serves as the law of the contracting parties and accordingly cannot be revoked or modified except by the mutual consent of the parties.<sup>121</sup> This section examines the formal requirements for contract formation and the policing doctrines that are available to limit part autonomy in case of contract imbalance.

##### i. Formal Requirements

The Egyptian Civil code declares three formal components for the validity of the contract formation which are a) mutual consent manifested by offer and acceptance, b) specific subject matter defined by the contract, and c) cause for the mutual obligation which is generally referred to as the consideration.<sup>122</sup> The form of regulating e-contract law in Egypt is controversial because it is subject to the general rules of contract law while the E-contract nature is different from the classical understanding of the contract. In that manner, the applicability of general contract formal rules stipulated in the Egyptian civil law will be evaluated on the nature of E-contract.

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<sup>118</sup> *Supra note*, at 52.

<sup>119</sup> The E-Signature Law No. 15/2004

<sup>120</sup> Consumer Protection Law No. 181/2018

<sup>121</sup> The Egyptian Civil Code, Article 147(1).

<sup>122</sup> *Id.*, Articles 89-98.

The first element of contract formation is the mutual consent manifested by offer and acceptance. The requirements for the formation of a contract are designed to fulfill three functions which are evidentiary, cautionary, and channeling.<sup>123</sup> In the e-contract formation, the fulfillment of the three functions is problematic because of the nature and environment of electronic contracting lack Face-to-Face (F2F) communication. The e-contract evidentiary function refers to the delivery of evidence for the existence of a contract, which corresponds to writing and notarization in offline mode of contracting and the click of “I accept” in online transactions. The cautionary function serves as a deterrent for inconsiderate action. The means adopted to alert the consumer is designed by the business; and accordingly, it lacks a clear form through which it can be inferred. While the channeling function signals the existence of an enforceable promise; but it has been reported that consumers may not understand e-purchase as a contractual activity.<sup>124</sup> The channeling role may be presented in the form of an offer, which is not indicative of what is following. For example, the case of Adobe. Inc. may serve as an example to illustrate the difficulties that the consumer encounter during online shopping. The offer was in the form of advertising for a one-week free trial is contrary to the context of the contract which includes a one-year subscription with a withdrawal penalty of an amount equal to six-month subscription fees. So, the impression generated from a mere pop-up advertising window does not entail channeling an enforceable contractual agreement. In that context, different formal requirements will be more appropriate for different factual situations.<sup>125</sup> This drawback does not necessarily suggest a different form of rules; but rather a different regulatory model to account for the different nature of the transaction. Additionally, acceptance is manifested by a “click” which is not sufficient action to imply the understanding of the content and voluntary manifestation.<sup>126</sup> The validity of the E-contract consent is based on the “duty to read” doctrine which assumes that the consumer read the

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<sup>123</sup> *Supra note*, at 53.

<sup>124</sup> See Kim, Nancy S. *Wrap Contracts: Foundations and Ramifications*. OUP USA, 2013. The author presents a report concluding that law students do not realize that contractual obligations are attached to online activities.

<sup>125</sup> *Supra note*, at 53. Fuller suggests different requirements of means of channeling, to signalize the presence of contractual obligations, used between two merchants and used in door-to-door sale.

<sup>126</sup> In some instance, the click is not even necessary as the case of “browse wrap” agreements that require checking the website for terms of use. See Souq.com <https://egypt.souq.com/eg-en/terms-and-conditions/c/#26>

terms and conditions to which he is consenting. Otherwise, the consent shall be deemed deficient. The different description of consent with regard to E-contract is “implied consent” which violates the understanding of valid consent as per the Egyptian civil law.<sup>127</sup> In that manner, any factor that may defect the free consent of the consumer invalidate the contract formation. Those invalidating factors are present strongly in the e-commerce environment that shall be considered characteristics of the online shopping environment such as incapacity, misrepresentation, and duress. Firstly, the capacity of an online consumer in terms of their age may invalidate the completion of e-contract given the age restriction terms available in the e-contract as the terms of use proposed by Facebook.<sup>128</sup> Secondly, the misrepresentation category includes failure to disclose product information that should have been given to consumers.<sup>129</sup> Third, the economic duress or undue influence, which is an extension of the consent by force, is manifested in the idea of “take or leave it” concerning access to online platforms such as the terms of use of Twitter and Facebook.<sup>130</sup> Moreover, the undue influence of the personalized offers, that are based on behavioral information, may qualify as an extension of the duress doctrine. In this regard, psychological and behavioral studies suggest that consumers are highly affected by temptations, which result from the business’s upper position of knowledge about the consumer’s preference, to agree regardless of the content of the contract.<sup>131</sup> This factual process represents restrictions on the manifestation of voluntary intent to accept the offer.

Overall, the point of voluntary consent is questionable in this form of commerce because there are no alternatives other than accepting the offer. Otherwise, you are not allowed to access the service. The context of the electronic transaction is disregarded in the formal

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<sup>127</sup> Bahgat, ahmed abdeltawab, *Electronic Contract Formation: A Comparative Study between Egyptian and French law*, Costigan, Dar ElNahda 2009. (Bahgat discussed the debate on the expressed consent when it contradicts with the implied consent because the expressed consent fullfill the formal criteria while the implied consent deals with the substantive criteria. He concluded that the the expressed action is the determinant given the confusion which may result from depending on the intent). See also George P. *Implied-in-Fact Contracts and Mutual Assent. Harvard Law Review* 33, no. 3 (1920): 376–400. <https://doi.org/10.2307/1327478>.

<sup>128</sup> See [https://web.facebook.com/terms.php?\\_rdc=1&\\_rdr](https://web.facebook.com/terms.php?_rdc=1&_rdr) (the minimum age is 13 or the minimum legal age as per the jurisdiction of the user)

<sup>129</sup> *Supra note*, at 6.

<sup>130</sup> See Facebook terms of use.

<sup>131</sup> *Supra note*, at 73.

requirements of contract law. The environment of electronic transactions involves higher risks; in addition to the bargaining power disparity and information asymmetries in SFC, which are not even accounted for in this traditional form of rules. The online risks include higher levels of information and technological asymmetries which require the consideration of the behavior of the consumer. The technological asymmetries refer to the imbalance between the technological experience of the business compared to the consumer. In the age of the Internet and unauthorized personal data collections, businesses have the upper hand in designing offers based on the information stored for each consumer, which affects the validity of consent given the influence imposed on the freedom of choice.<sup>132</sup> The rational premise is based on that contracting parties can assess their contractual opportunities freely and make welfare-maximizing decisions. However, e-transaction has several behavioral defects that invalidate the consent under reasons of duress, misunderstanding, and incapacity.

The second component in the formation of the E-contract is the subject matter of the contract. The current Egyptian legal system falls short of complete explanation and specification for the subject of the E-contract because current laws deal only with general goods and services without focus on electronic products and services sold online such as electronic computer programs and musical records. Also, the treatment of the electronic sale of illegal products and services is not specified under the current legislation such as alcohol and cigarettes. This vacant area of legislation poses a pressing question of how to deal with consumer rights in this regard. Lastly, the third element of contract formation is the cause of the contract, which is the mutuality of obligations, In the context of E-contract, the cause is evident in the payment of the price in exchange for the delivery of products or download of intangible products, which represent a major part of the B2C electronic transactions. Nonetheless, the cause is missing in a different type of free electronic services as the use of Facebook whereby there is no obligation on the consumer in terms of payment for the provided services. In light of the aforementioned factual circumstances, the

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<sup>132</sup> Becher, Shmuel I., and Tal Z. Zarsky. "E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation." *Michigan Telecommunications and Technology Law Review* 14, no. 2 (2008 2007): 303–66.

adequacy of the application of general contract rules in civil law to the E-contract formation is questionable.

## *ii. Civil Law Policing Doctrines*

In Egypt, the civil code has general provisions, which are applied to all contracts including the E-contract. The legislator created special provisions to deal with contract imbalances to protect the weaker parties. The policing doctrines provide the judge with leeway to ensure contractual fairness. So, The Egyptian legislator opted to use safety nets that are applicable under judicial scrutiny in quest of safeguarding the weaker party's interests. In this regard, the legislator included the following doctrines to limit the freedom of contract to reach contractual justice:

### a) Balancing the Contract of Adhesion

The civil code stipulates that if a contract of adhesion contains harmful conditions, the court may annul or amend these conditions "according to the principles of justice."<sup>133</sup> The adhesion contract involves substantive and constitutive imbalance that results in unequal power for contracting parties. The weaker contracting party is bound to adhere to standard conditions that were created by the other party and that are not subject to negotiations.<sup>134</sup> Nonetheless, Egyptian law acknowledges the significance of adhesion contracts to fulfill the need for mass contracting including electricity, gas, water, insurance, and banks.

### b) The Doctrine of Exploitation

Under the Egyptian code, contractual exploitation means the exploitation of one party's circumstances in a way that leads to unfair or unequal contractual commitments and benefits.<sup>135</sup> Accordingly, the Egyptian legislator provides the judge with the tool to reduce the party's commitment to the interest of the weaker party by stating that "if one of the contracting parties has been subjected to exploitation because of his need, lack of notice or inexperience, the judge may reduce his commitments."<sup>136</sup> The utopian idea that contracting parties are equal is overcome by the reality that there are differences in economic,

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<sup>133</sup> *Supra note*, at 120, Article 149. The memorandum explains that this stipulation might serve as an effective device of the court to defend, inter alia, the consumer from prejudicial conditions made by the business.

<sup>134</sup> *Id.*

<sup>135</sup> *Supra note*, at 120, Article 129(1).

<sup>136</sup> *Id.*

bargaining, and information. These differences may affect the contractual equilibrium, and, hence, the inequality of parties requires a different treatment.

c) The Doctrine of Abuse of Rights

The doctrine of abuse of rights entails a restriction on the individual's free action from making illegal or immoral use of his rights for higher social interests. The doctrine has a definite moral rationale to differentiate between abuse and exploitation of rights, which is the magnitude of the practice to constitute a fault. The fault may consist of actions with the sole intention of harming someone else, or with disregard of the interests of society or another person.<sup>137</sup> Its main purpose to affirm that the exercise of a right is considered unlawful in the following cases: "(a) if the sole aim thereof is to harm another person, (b) if the desired benefit is out of proportion to the harm caused thereby to another person, and (c) if the desired benefit is unlawful."<sup>138</sup>

d) The Doctrine of Unforeseen Circumstances

The doctrine of unforeseen circumstances applies to the circumstances that occur after the formation of a contract. It is considered as an exception for the general principle of *pacta sunt servanda* that results from exceptional and unforeseen circumstances of a general character that hinder the performance of the contractual obligation without making it impossible.<sup>139</sup> In that manner, it becomes onerous to threaten the weaker party with excessive obligations. So, the judge may, under circumstances, and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level.<sup>140</sup> Thus the legislation confronts the rigid principle of party autonomy by this doctrine to provide an excuse for the party that cannot fulfill its obligation because of supervening conditions.

e) Good Faith

It stipulates that a contract must be formed and executed with consideration of the concept of good faith. The principle of good faith is a fundamental moral obligation of the freedom

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<sup>137</sup> Bechor, Guy "To Hold the Hand of the Weak?: The Emergence of Contractual Justice in the Egyptian Civil Law." *Islamic Law and Society* 8, no. 2 (2001): 179–200.

<sup>138</sup> *Supra note*, at 120, Article 5.

<sup>139</sup> *Supra note*, at 120, Article 147(2)

<sup>140</sup> Donini, Valentina M. "Protection of Weaker Parties and Economic Challenges: An Overview of Arab Countries' Consumer Protection Laws." *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 78, no. 4 (2014): 784–808.

of contract, denoting that the contract should be formed with good intentions.<sup>141</sup> The conceptualization of this doctrine is fundamental in understanding the underlying social objective of the legislation to reduce immoral practices in civil and social life. The absence of good faith in the formation of the contract reveals the existence of opportunism which entails public intervention to protect the weaker party.

By the virtue of these doctrines, the judge may intervene in the contract's provisions exercising a power of review to protect the fairness of the transaction. These doctrines act as moral guardians standing against the excessive use of party autonomy in the contractual domain. Its main objective is to circumscribe the freedom of contract to mitigate the risk of abuse and imbalances. Accordingly, the safety nets are the last step in the adjudication process. It is worth mentioning that the litigation step is unreachable in several consumer disputes by the virtues of E-contract dispute restriction provisions.

## 2. E-signature Law No. 15 for the Year of 2004

The first Egyptian legislative step towards e-commerce is the Electronic Signature Law No. 15 of the year 2004 and its Executive Regulation No. 109 of the year 2005.<sup>142</sup> The E-signature law regulates electronic contracts and online transactions. This legislation authorized electronic means to issue, exchange, and store documents, thereby guaranteeing the credibility and enforceability of electronic transactions, and preserving the rights of the parties.<sup>143</sup> The E-signature law established a public authority Information Technology Industry Development Agency (ITIDA) with public corporate personality and affiliated with the Ministry of Communications and Information.<sup>144</sup> Accordingly, the Egyptian legislator considered the E-signature law as a tool to legislate the existence of electronic

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<sup>141</sup> *Supra note*, at 120, Article 148(1).

<sup>142</sup> The E-Signature Law, No. 15 of 2004 (hereinafter referred as E-signature law) which followed the recommendations of UNCITRAL and its Model E-Commerce Law that was passed in 1996; however the Egyptian legislator adopted in minimal approach given that the e-signature law doesn't regulate E-commerce with its various fields.

<sup>143</sup> *Supra note*, at 118, Articles 16, 17 and 28.

<sup>144</sup> *Supra note*, at 118, Article 3. The function of ITIDA are a) Encouraging and developing information and communications technology; b) Transferring and using advanced information technology; c) Increasing opportunities for exporting communications and information technology services and the products thereof; d) Participating in the development and improvement of entities operating in the ICT field; e) Promoting and supporting small and medium enterprises in the area of using and applying the electronic transaction mechanisms (applications); f) Regulating the activities of e-signature services and other activities in relation to e-transactions and the information technology industry.



contracts and transactions without tackling the problematic areas of taxes and the time of completion of the electronic transactions.<sup>145</sup> It is important to highlight that Egypt has signed a bilateral statement with the United States (1999) that aims at aligning with the objectives of the USA system to establish a common agreement with trading states based on USA policy positions and principles concerning the evolving global governance and development of the Internet.<sup>146</sup> Thus, the approach of the Egyptian legislator was pragmatic in terms of adopting only one legislation regarding E-signature instead of special legislation about e-commerce in general, which could have resulted in conflict with the general rules of contract law stipulated under the civil law. As a result, Egypt lacks specific legislation to deal with the practical aspects of the electronic transactions including its completion, the liability of each party, burden of proof and methods of evidence, and challenges of the jurisdiction of civil and commercial laws.<sup>147</sup> Overall, the Egyptian legal regime is silent with regards to the details of e-contract so that it complies with the general contract laws in the Civil code.

### 3. Consumer Protection Law

The consumer protection Law (CPL) is an *ad hoc* legislation to guarantee the protection of consumer rights in general. It is directed to address the contractual imbalance in B2C contracts. CPL was first rectified in 2006 and then amended in 2018 to include new sections regarding distant contract and information-disclosure rules.<sup>148</sup> The CPL indorses consumer rights prescribed in the United Nations Guidelines for Consumer Protection (UNGCP). These rights encompass access to products' information about the disclosure of the identity of the manufacturer and seller, access to a complaint system, and the right to take legal action against malpractices.<sup>149</sup> CPL promulgates "Consumer Protection Agency (CPA)" as

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<sup>145</sup> Bahgat, Ahmed "Electronic Contract Formation (Comparative Study Between The Egyptian And French Law)" 2009

<sup>146</sup> The following broad principles govern the development and use of electronic commerce that are the cornerstone of USA policy on E-commerce: private sector leadership, minimal government regulations and restrictions, government encouragement of self-regulation, duty-free treatment of digital goods of value, and promotion of cooperation among all states. As provided in AmCham. "Partnerships & Agreements." Accessed March 31, 2021. See [https://www.amcham.org.eg/information-resources/trade-resources/egypt-us-relations/partnerships-and-agreements.](https://www.amcham.org.eg/information-resources/trade-resources/egypt-us-relations/partnerships-and-agreements)

<sup>147</sup> S E Blythe, 'E-commerce Security in the Land of the Pharaohs: Refining Egypt's Electronic Signature Law' (2011) 21 Ind. Int'l & Comp. L. Rev. 181

<sup>148</sup> *Supra note*, at 119.

<sup>149</sup> *Supra note*, at 90.

the appointed state-governed institution for consumer protection. CPA is entitled to receive consumers' complaints arising from violations of CPL through a three-step plan.<sup>150</sup> First, Non-Governmental Organizations (NGOs) may take part when the business firm and the consumer do not settle. Second, the case is directed to a mediation committee, which is formed by the CPA with no power of binding decisions, in case of failure of settlement by the NGO. Third, the consumer may seek legal action in courts.

Regarding the consumer rights in electronic transactions, The CPL defined distant contract in the new version of 2018 as the “displaying, selling or purchasing products using the Internet, or any other means of visual, audio or print communication, or by telephone or other means.”<sup>151</sup> To analyze the e-contract, three areas of protection shall be examined given their relevancy to the imbalance in B2C e-transactions which are, information disclosure laws, withdrawal laws, and unfair terms embedded in e-contract. First, Information plays a leading role in the imbalance between business and consumer. CPL requires the disclosure of pre-contractual and post-contractual information.<sup>152</sup> The information disclosure came in compliance with the essence of the Civil Code of Egypt that grants the buyer the right to know the characteristics and properties of the goods before the completion of the purchase.<sup>153</sup> Secondly, the goal of the withdrawal right is to mitigate the risks that are associated with distance B2C selling including the absence of inspection before purchase. The withdrawal right is granted to the Egyptian consumer within a period of 14 days after the receipt of the products.<sup>154</sup> Third, the unfair terms mean “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.”<sup>155</sup> The Egyptian

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<sup>150</sup> *Supra note*, at 119, Article 42.

<sup>151</sup> *Supra note*, at 119, Article 1 and as per consumer rights directive 2011/83/EU “‘distance contract’ means any contract concluded between the trader and the consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”

<sup>152</sup> *Supra note*, at 119, Article 37.

<sup>153</sup> *Supra note*, at 120, Article 419.

<sup>154</sup> *Supra note*, at 119, Article 38 with the exception of the enforcement of this right based on grounds listed in article 41.

<sup>155</sup> European Council (EC) Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Pub. L. No. 31993L0013, OJ L 095 (1993), Article 3.

Civil Code refers to this type of term indirectly in its civil law.<sup>156</sup> However, CPL doesn't include the prohibition of the use of certain terms that may be considered unfair in e-contract.

On the international level, there is a harmonization approach adopted by soft law instruments to set the standard of consumer protection laws and practice.<sup>157</sup> Hence, UNGCP was adopted in 1985 and updated in 2015 to account for the risks associated with e-commerce in general.<sup>158</sup> UNGCP serves as a reference to set the standard for the main features of effective consumer protection in e-commerce. The UNGCP provides policy recommendations for governments and businesses and leaves them enough flexibility when transposing those principles into national laws. Also, the Organization for Economic Cooperation and Development (OECD) issued guidelines for consumer protections in e-commerce.<sup>159</sup> The guidelines were revised in 2016 to account for the new challenges in e-commerce.<sup>160</sup> In light of their influence, Egypt rectified consumer law in 2006 and amended it in 2018; however, adjustments were made to fit the specific challenges as a developing country which may be framed as a conservative approach of implementation of the UNGDP guidelines. Despite the effects of the soft instruments, the diversity of national laws among states results in different levels of consumer protection depending on their jurisdiction. Hence, it may lead to inequality against certain nationals through the elimination of consumer rights in e-contract in light of the Egyptian weak e-contract regulation system. Nonetheless, the adoption of a uniform legal framework for consumer protection is complex in light of the different national policies and ideologies behind regulations. The Egyptian consumer protection legislations are different from the EU

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<sup>156</sup> *Supra note*, at 120, Articles 143 and 149. The ground of the invalidation of the contract or of single contractual clauses due to the existence of unfair terms and conditions. The law stated that if a contract of adhesion contains prejudicial conditions, the court may amend these terms according to the principles of justice, or even declare them void. See also Article 151(2), which lay down the principle of Interpretation contra proferentem: in case of doubts or ambiguity in these terms, Interpretation should be detrimental in favor of the adhering party.

<sup>157</sup> Harmonization refers to "the approximation of the fundamental principles of national laws and seeks to eliminate major differences and create minimum requirements or standards in order to achieve consistency of rules." See Wei, D. "From Fragmentation to Harmonization of Consumer Law: The Perspective of China." *Journal of Consumer Policy* 43, no. 1 (2020): 35–56.

<sup>158</sup> *Supra note*, at 90.

<sup>159</sup> *Supra note*, at 5.

<sup>160</sup> *OECD Recommendation of the Council on Consumer Protection in E-Commerce*. OECD Publishing, 2016.

model where the European legislator focuses on strong regulatory market control and command.<sup>161</sup> EU addresses consumer rights with substantive directives. It rectified directives on unfair terms and consumer rights that require transposition in the different member states to provide a common legal framework for consumers in the member states. One of the successful EU regulations with regards to the area of privacy and personal data protection is the General Data Protection Regulation (GDPR), which was rectified in May 2018.<sup>162</sup> GDPR is outreaching because of its extraterritorial nature that applies to European and non-European business firms concerning the personal data of European and non-European residing in the EU. So, the GDPR is directed towards business firms, individuals, courts, and authorities without transposition requirement into member state's national law. This type of legislation incentivized other states to follow their lead and rectify similar provisions as the case in Egypt that implemented GDPR like-rules in 2020.<sup>163</sup> The new Egyptian personal data protection law regulates the processing activities of personal information of Egyptians and non-Egyptians residing in Egypt by requiring their consent. Additionally, it prevents disclosure of data to third parties unless permitted by law. Further, it provided a strong incentive for compliance in the sense that the breach of its provisions will be accounted as a criminal liability in addition to administrative sanctions.<sup>164</sup> Thus, it obliges business entities worldwide to comply with the standards of consumer personal data protection. Nonetheless, the enforcement of this law is subject to international cooperation efforts that are not mandatory in other states.

Nominally, the law is structured with consideration for consumer protection and is expected to achieve the social goals of balancing the contracting powers. However, looking at how the courts interpret the legislation doesn't reflect this structure in execution. As the concept of adhesion contract is applied narrowly restricting the application of the policing doctrine of adhesion to the essential products where the consumer has no other option.<sup>165</sup>

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<sup>161</sup> Willemys, Ines. "Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations." *Journal of International Economic Law* 23, no. 1 (March 1, 2020): 221–44.

<sup>162</sup> General Data Protection Regulation (GDPR) REGULATION (EU) 2016/679.

<sup>163</sup> Egypt New Personal Data Protection Law No.151 for 2020.

<sup>164</sup> Albrecht, Jan Philipp. "How the GDPR Will Change the World Forward." *European Data Protection Law Review (EDPL)* 2, no. 3 (2016): 287–89.

<sup>165</sup> Appeal no. 1911 for the year of 2012, court of cassation ( the court didn't consider banking contract as adhesion contract reasoning that consumer have the option to choose between banks.)

The relation between rules and social function is not relevant to law enforcement in Egypt. This understanding conforms with the legislator philosophy of granting the judge the power to decide on this type of contracts; nonetheless, the responsibility of connecting the desired objectives of protecting the weaker party to the interpretation of current legislation is hindered by the politicized background of protecting and sustaining the private sector leadership.<sup>166</sup> This results in the gap between the consumer protection legislation and the courts' executions. So, the interim conclusion is that the Egyptian legislative landscape of E-contract takes into consideration the rights of consumers in a formal way, but lacks the means for an accessible enforceable system. The rationale for selecting this regulatory model will be examined in the upcoming part.

### B. Substantive Considerations

The substantive fairness of the e-contract regulation lies in balancing its moral, socio-economic, and political considerations. The approach of the Egyptian legislator addresses party autonomy as a key objective to be protected. Also, consumers, in legislation, are recognized as an independent category with legitimate rights and interests. The Egyptian legislator guarantees the consumer right in two instances: first the five exceptional provisions of the Egyptian civil law; and second the special legislation concerning consumer protection law. Civil law and CPL reflect important foundations, for instance, the moral objective of protecting weaker parties, distributive justice, and governmental intervention in market failures. The process of e-contract demonstrates that consumers do not share common background; as they have different economic, cultural, and technological levels. The risks embodied in the e-transaction mechanism illustrate the disequilibrium between the parties. This understanding is part of the Egyptian jurisprudence of contract law. "In an ideal world, all consumers would understand their rights and have easy access to remedies when they have problems in e-purchases. Instead, the world is less than ideal" and consumers, in the first place, do not realize they have the right to look for it.<sup>167</sup>

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<sup>166</sup> Abd al-Razzaq al-Sanhuri, *al-Wasit fi sharh al-qdniun al- madani*, 12 vols. (Cairo: Dar al-Nahda al-'Arabiyya, 1")

<sup>167</sup> Loos, Marco. "Access to Justice in Consumer Law." *Recht Der Werkelijkheid* 36 (November 1, 2015).

The justiciability of consumer rights refers to “the value of a right depends heavily on the mode of its enforcement and, in particular, the costs associated with this enforcement.”<sup>168</sup> In practice, Consumers are deprived of their basic rights by the power of unjust contractual terms that become the norm of business practice without proper state intervention to ensure their protection. By the virtue of e-contract, business firms restrict the consumer right to seek redress in courts in violation of their constitutional right.<sup>169</sup> Business enterprises usually set restrictive contract provisions including arbitration clauses, choice of forum clauses, or applicable law clauses that are familiar to themselves to avoid the legal risks associated with cross-border transactions. So, they relinquish rights including; the right to litigate (or arbitrate) in a convenient forum and the right to hold those who cause harm to persons or property liable for damages.<sup>170</sup> The Egyptian legislation lacks an efficient legal mechanism to prevent the inclusion of the unfair terms in B2C contract given that the CPL is silent concerning the provisions for arbitration, choice of forum, and applicable law which is considered unfair terms as per the EU directive on unfair terms.<sup>171</sup> The Egyptian legal model reflects uncertainties concerning questions such as which court has jurisdiction, which national contract law that court shall apply, and whether a resulting judgment will be enforced in another nation-state. Thus, the law is less transparent and adaptable for the parties in terms of consumer law enforcement and dispute resolution mechanism. So, the last defense is the judge who however may not receive this case because of the dispute settlement restrictions in the E-contract. For example, the transaction of Adobe.Inc is subject to the law of Ireland as the applicable law and arbitration as the method for dispute resolution following their general terms of use.<sup>172</sup> So, consumers, when conducting online transactions, are subject to the business’ terms and conditions without a clear scheme of efficient redress methods. The result is the prevalent use of informal negotiations that lead to consumers’ rights being shaped based on social

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<sup>168</sup> Eidenmueller, Horst G. M., and Martin Engel. “Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe.” *SSRN Electronic Journal*, 2013.

<sup>169</sup> Constitution of the Arab Republic of Egypt (2014), Article 97, states that “litigation is a right that is safeguarded and an inalienable right for all. The State shall guarantee the accessibility of judicature for litigants and rapid adjudication on cases.”

<sup>170</sup> *Supra note*, at 6.

<sup>171</sup> *Supra note*, at 71, Annex (q).

<sup>172</sup> See [https://www.adobe.com/mena\\_en/legal/terms.html](https://www.adobe.com/mena_en/legal/terms.html) (If you reside outside of North America, your relationship is with Adobe Systems Software Ireland Limited, and the Terms are governed by the law of Ireland and the dispute resolution forum is final and binding arbitration).

norms generated by sellers as a result of market forces and pressures rather than in compliance with legal principles. The role of legal rules loses its deterrent effect and its use is restricted while the social and market norms (*Lex Marctoria*) takes a more effective part in shaping the redress forums on the ground.<sup>173</sup> In light of these circumstances, the business autonomy was shifted to heteronomy as the business firm role is transformed to a lawmaker by the virtue of the e-contract.<sup>174</sup> In this view, consumer rights may be considered "the egg society must break to make the omelet of welfare; the bad consequences of exceptions to the rules would outweigh, in this case, and in every other, any gains we might derive from attempts to preserve the contours of the original compromise"<sup>175</sup> The understanding of consumer protection as a matter of rights necessitates accountability for achieving a proper standard of protection including legal enforcement, not just legislations without action in the online environment. Additionally, providing a well-developed and enforceable consumer protection mechanism will act as an incentive to expand market access to e-commerce. As studies show that Egyptian consumers are reluctant to participate in e-commerce because of the perceived security risk of that mode of shopping.<sup>176</sup> So, a higher level of consumer protection will contribute massively to the rapidity and trust in e-commerce as it will evidence the Egyptian governmental intent to protect the users of the online world.

### C. The Institutional Considerations

The institutional considerations are concerned with the competence of the legal authority to enforce the assigned tasks.<sup>177</sup> Under the Egyptian e-contract regulation, CPA is the appointed authority to deal with claims in relation to violation of CPL; in addition to the economic and administrative courts which are the appointed authority to review the legal disputes of the e-contract. This conflict questions the efficiency of the court, litigation in general, to enforce or resolve the disputes that arise from B2C e-transactions. Although the Egyptian system is well developed in terms of laws and procedures; but faces many

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<sup>173</sup> I. Ramsay, Consumer Redress Mechanisms for Poor-Quality and Defective Products, 31 University of Toronto Law Journal 117, 129 (1981). See also H. L. Ross and N. O. Littlefield, Complaint as a Problem Solving Mechanism, 12 Law & Society Review 199–216 (1978)

<sup>174</sup> *Supra note*, at 6.

<sup>175</sup> Kennedy, Duncan. "Legal Formality." *The Journal of Legal Studies* 2, no. 2 (1973): 351–98.

<sup>176</sup> *Supra note* 4, at 11

<sup>177</sup> *Supra note*, at 52.

challenges with regards to B2C disputes related to court administration, due process, lengthy procedures, enforcement, and access to justice.<sup>178</sup> The national courts are ill-equipped concerning expertise, language capabilities, and costs.<sup>179</sup> The sufficiency of public enforcement is challenged to stand against the e-market unfair practices because the nature of the borderless commerce facilitates deceptive behavior in absence of policing authority. The associated obstacles may include; geographical distance between one party and the competent court, language differences, and a lack of knowledge as to the applicable substantive law. These types of obstacles trigger even higher transaction costs for resolving disputes through the court system.<sup>180</sup> So, the conflict lies in the argument of courts are the reliable authority for dispute resolution while access to court is complicated. The governing laws lack any jurisdiction power over business firms outside Egypt which results in the complexity of enforcement in case of reaching a court decision in Egypt. This failure calls for the suggestion of the competence of another institution. To wrap up, Egyptian consumer encounters violations of their rights without proper access to the effective remedy or even efficient reporting system of said incidents to act against those online platforms to alert other consumers, which require an enforceable regulatory model.

In light of the failure of courts as an effective forum to manage the B2C disputes of E-contract, the problem of consumer E-contract regulation in Egypt resulted in the privatization of legislations and private lawmaking without the proper role of the state. In other words, the state keeps on ratifying new rules and regulations to assure consumer rights without a proper enforcement mechanism. The current shortage of a proper forum for consumer law enforcement is not a novel problem. Each state has its national objectives along with the challenges of globalization and cross-border transactions, states' power to control the flow of electronic transactions is circumscribed. Actually, the companies are getting more powerful in issuing the law and obtain a legitimate waiver of rights based on

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<sup>178</sup> Richard Gold, Brian LeDuc and Amir Mikhail, Rule Of Law Sector Assessment Of Egypt's Economic Courts", AMEX International for the United States Agency for International Development (March 2019), [https://pdf.usaid.gov/pdf\\_docs/PA00TSBQ.pdf](https://pdf.usaid.gov/pdf_docs/PA00TSBQ.pdf).

<sup>179</sup> *Supra note*, at 106.

<sup>180</sup> Eidenmueller, Horst G. M., and Martin Engel. "Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe." *SSRN Electronic Journal*, 2013.



the ignorance of the consumer because they legislate the structure of the transaction to their best deeds. The choice has been made and the outcome is that the consumer is left without remedy given the high costs associated with litigation along with the consumer's difficulty to litigate in light of the nature of the e-transaction.

#### D. The assessment of the Egyptian E-regulation

The form of obligations stipulated under the Egyptian legislative model is generic and accordingly lacks jurisdiction to impose any obligations on the business firms in cross-border transactions. The cross-border nature of the online market represents a major challenge to the relevant authorities with enforcement because of jurisdictional restrictions on their power. So, there is a gap between the level of protection in legislations and the real situation that results in zero protection of consumer rights as demonstrated by the adobe Inc. case, which was subject to unfair terms and relinquishing of constitutional rights over which the domestic legal system has no power. Thus, the Egyptian model leaves the market for self-regulatory practices.

Ultimately, The E-contract fails to fit into the general rules of contract law. The utopian logic of the Egyptian legislator is inspired by the protection of the weaker party and the balance of contracting parties. In that context, "if contract law requires businessmen of equal bargaining power to look out for one another, then it is more plausible that public law should require strong groups to look out for weak ones."<sup>181</sup> Nonetheless, there is a shortage of specialized legislation that copes with the nature of the e-contract and the risks imposed on the electronic consumers, which results in abandoning the consumer solely under the control of the business enterprises. The Egyptian solutions for the B2C legal claims seem unreachable. To wrap up, the general sense is that the regulatory framework that governs E-contracts must ensure that asymmetries are smoothed to the effect that, on the one hand, do not unacceptably infringe individual rights; while, on the other hand, they do not unacceptably obstruct e-commerce by means of disproportionate transactional costs. This model shed the light on the minimalist ideological subtext of Egyptian legislation. The public welfare notion predominates the Egyptian legislator's rationale of consumer protection; however, the enforcement shows the adherence to the freedom of contract as the core value of contract law. In practice, The Egyptian e-contract legal model seems to

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<sup>181</sup> Kennedy, Duncan. "The Political Stakes in 'Merely Technical' Issues of Contract Law," n.d., 2

be in another regulatory sphere when it comes to cross-border E-commerce. The substantive legislations seem outdated to cope with the challenges of E-commerce. The enforcement of the protective laws is often challenged by weak, non-independent implementation structures, by lack of expertise and awareness, by the inadequacy of authorities, and by insufficient resources.<sup>182</sup>

In conclusion, this chapter argues that the nature of E-contract does not fit into the formal requirements of the general contract laws in Egyptian civil law. It, further, argues that positioning the policing doctrines, being safety nets to protect consumer rights, as last resort in the court process is detrimental given that access to litigation is impaired by the virtue of the dispute restriction provision in e-contract. Thus, the consumer rights stipulated under the CPL are not enforced given that the state does not have enough power over business entities in the online environment. Hence, there are no proper means for consumer rights enforcement in E-commerce, which resulted in the dominance of private ordering. The reason for this chapter is to prove that the traditional regulatory regime failed to cope with the technological developments and to provide efficient legal solutions to deal with e-contracts. So, chapter 3 shall shed the light on the private self-regulatory measures, as the dominant substitution for the legislation in place, to meet the consumer needs in the digital market.

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<sup>182</sup> *Supra note*, at 119, Article 44. The source of funding the state-governed authority (CPA) is the state budget and donations.

#### IV. Private Ordering and Reforms in the Egyptian Regulatory Model

Private ordering acts as an alternative to the public state regulation in the absence of proper public enforcement.<sup>183</sup> The Egyptian regulatory model of E-contract does not seem to provide an efficient enforcement mechanism to conduct the e-transaction without under-privileging the consumer right or the business' legitimate interest. To opt out of an inefficient public legal system, private entities had to take the lead to manage their consumer claims.<sup>184</sup> The private institutions' methods are directed to empower consumers with informal portals to participate in improving the business practice through online dispute prevention and dispute resolution systems. The use of these alternatives became indispensable to cope with the cross-border and advanced technology associated with the e-contract. This chapter presents the solutions adopted by the private institutions and the proposal of required reforms in the Egyptian regulatory landscape to improve the level of protection for E-consumer. In doing so, the conflicting considerations' framework will guide us through the analysis to assess the formal, substantive, and institutional considerations of the private ordering.

##### A. Formal Considerations

The private system stepped in response to the demand for legal certainty in B2C e-contracts. The role of business enterprises is particularly important in E-commerce as they represent the experienced party, which seeks to maximize their profits with the least drawbacks. Accordingly, businesses started to self-regulate their disputes according to their best interests. Various methods were created to meet consumer needs whereby a different form of E-contract regulation emerged and was sponsored by the private institutions. This section examines the different forms of business methods in E-commerce to replace the inefficiency of the prevailing public legal system and meet their consumer needs.

The private ordering mechanism can be classified into two routes; dispute avoidance and dispute resolution. This categorization is based on the time of intervention before the dispute (*ex-ante*) and after the dispute (*ex-post*).<sup>185</sup> They encompass several methods implemented by firms to handle the consumer claims as self-regulating their business

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<sup>183</sup> Calliess, Graf-Peter. "Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, June 28, 2010.

<sup>184</sup> Cortés, Pablo. "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers." *I. J. Law and Information Technology* 19 (March 1, 2011): 1–28.

<sup>185</sup> *Supra note 6*, at 228.

without interference from states. In the following parts, brief examinations of the existing private instruments used in the B2C E-contract. Then, the contribution of these measures to resolving the e-contract regulation challenges will be assessed.

### 1. Online Dispute Prevention (ODP)

These measures are taken to empower e-consumer and raise the level of awareness of their collective power and awareness against unfair practices in the e-market.<sup>186</sup>

#### *i. Reputation and Feedback*

The feedback mechanism is the method by which business measures the level of satisfaction of their consumers after each transaction through sending followup messages. This early friendly action enables the business to evaluate the consumer's experience and avoid any potential problems. Other reputation factors are third-party reviews on social media platforms and ratings on business websites that have a direct effect on the standing of the possible collaborations with the business.<sup>187</sup> So, when disputes arise, the consumer reviews and social media platforms contribute to the form of a fairer settlement for the consumer through imposing informal reputational sanctions on unfair sellers.<sup>188</sup>

#### *ii. Trustmarks*

Trustmarks are helpful tools to identify high-standard sellers, who have granted quality seals once they fulfill set criteria prescribed in an independent institutional code of practice. They are quite beneficial as they represent clear evidence for good business practitioners and Small and Medium Enterprises (SME) So, Trust marks act as a signal of quality for the identified sellers.<sup>189</sup>For example, the International Standards Organization (ISO) proposes standards in various areas relating to consumers, banking, health, and other technical areas.<sup>190</sup>

#### *iii. Electronic payment mechanism*

The payment mechanisms plays important role in contributing to the private ordering methods. It deals with fraud and dispute resolution procedures along with other errors such

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<sup>186</sup> OECD, OECD Conference on Empowering E-Consumers, Strengthening Consumer Protection in the Internet Economy, Background Report, Washington D.C., 8–10 December 2009 (2009).

<sup>187</sup> *Supra note 6*, at 229.

<sup>188</sup> E. Schneider and C. Kuner, Dispute Resolution in International Electronic Commerce, 14 *Journal of International Arbitration* 5, 26 (1997).

<sup>189</sup> *Supra note*, at 106.

<sup>190</sup> Sorieul, Renaud. "Brief Overview of International Initiatives for an Electronic Commerce Uniform Legal Framework." *Uniform Law Review* 4, no. 3 (August 1, 1999): 908–26.

as; processing input errors, online duplication, and authorization. So, several methods are in practice to ensure the security of the transaction, it includes third parties acting as trusted service providers to ensure the credibility of the transaction. One of the secured payment mechanisms is chargeback which is based on the policies set by major credit card service providers to cancel the online credit card payments of any disputed transaction for example Visa and Mastercard.<sup>191</sup>

## 2. Online Dispute Resolution (ODR)

This section discusses the ODR which is the online version of Alternative dispute resolution (ADR) to settle e-consumer conflicts.<sup>192</sup> ODR "is a range of processes fueled by information and communication technology (ICT)".<sup>193</sup> ODR includes electronic versions of negotiation, mediation, and arbitration. There are several participants in this form of dispute settlement other than the disputants which is the third party being a neutral party such as the mediator or arbitrator. Also, Technology plays as the "fourth party" in the ODR process and the "fifth party" includes the institutions that create the fourth party.<sup>194</sup>

### i. ODR Systems

#### a) Fully Automated Resolution System

The automated electronic system is based on game theory.<sup>195</sup> This type of resolution takes the form of negotiations without including other parties as it is blindly conducted. Smartsettle and Cybersettle are examples of ICT that is based on an entire blind-bidding system in which parties post their bidding amounts with certain factors are kept confidential such as a party's lowest accepted amount. This method is not available in Egypt.

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<sup>191</sup> *Supra note 6*, at 233.

<sup>192</sup> ODR began in 1996 in response to the disputes related to Internet activity and e-commerce and developed to include online and offline type of disputes. Ethan Katsh & Leah Wing, Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future, 38 U. TOL. L. REV. 19, 21 (2006).

<sup>193</sup> Ethan Katsh & Colin Rule, What We Know and Need to Know About Online Dispute Resolution, 67 S.C.L. REV. 329,339 (2016).

<sup>194</sup> Katsh, M. Ethan, and Janet Rifkin. *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. San Francisco: Jossey-Bass, 2001.

<sup>195</sup> G. P. Calliess and P. Zumbansen, Rough Consensus and Running Code, A Theory of Transnational Private Law 152 (2010).

## b) Online Mediation Mechanism

Mediation refers to the “process where neutral third parties are involved in encouraging the disputing parties to settle”.<sup>196</sup> It may encompass the form of conciliation, which is the case of the third party proposing a solution to the disputes.<sup>197</sup>

## c) Online Arbitration Mechanism

Online dispute resolution is generally defined as “the application of dispute resolution skills and resources over a network”<sup>198</sup>. It is accessible through several electronic communication means such as e-mails, web pages, online chat systems, and other e-forms of communication. ODR platform refers to “a system for generating, sending, receiving, storing, exchanging or otherwise processing communications.”<sup>199</sup> ODR brings disputing parties together through any electronic means (chats and emails) to discuss resolving their dispute. ODR can be provided through private entities or public ones. On the one hand, the private ODR belongs to the firm’s policies that resulted in several websites started to have their own ODR mechanism based on the considerations of efficiency and meeting their consumer needs.<sup>200</sup> This transition to ODR is beneficial enormously in terms of cost and time. One of the dominant states in adopting the ODR is the USA, which left it largely to the private sector where companies start to have their in-house mechanisms. Hence, only the main market players in e-commerce started to adopt this system due to the high investment cost of software purchase where artificial intelligence and blockchain technologies plays role in facilitating the process of resolving the disputes.<sup>201</sup> Also, The United Nations Commission on International Trade Law developed technical notes on online dispute resolutions to tackle issues in cross-border e-commerce transactions.<sup>202</sup> These notes act as guidelines for private institutions to set a practice standard for procedures; nonetheless, it is not binding.

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<sup>196</sup> *Supra note*, at 20.

<sup>197</sup> *Id.*

<sup>198</sup> See E. Katsh, *The New Frontier Online ADR Becoming a Global Priority* (2006),

<sup>199</sup> “Online Dispute Resolution | United Nations Commission On International Trade Law.” Accessed March 25, 2021.

<sup>200</sup> See Alibaba.com

<sup>201</sup> Exon, Susan Nauss. “Ethics and Online Dispute Resolution: From Evolution to Revolution.” *Ohio State Journal on Dispute Resolution* 32, no. 4 (2017): 609–64.

<sup>202</sup> See Commission on Int'l Trade Law, Rep. of Working Group III (Online Disp. Resol.) on the Work of its Thirty-Third Session, U.N. Doc. A/CN.9/868 (2016).

On the other hand, public ODR platforms are established by state organizations and act as a hub to collect data from the fragmented forms of ODR. The EU adopted a proactive position in this regard by issuing the ODR directive to resolve disputes between consumers and sellers concerning contractual obligations stemming from sales or services contracts for both online and offline transactions. To create a common structure for the ODR mechanism and eliminate the fragmented structure of private ODR, two legislative enactments were set up to create a framework for out-of-court B2C dispute resolution.<sup>203</sup> Accordingly, the European Commission started its online platform to protect European consumers while shopping worldwide.<sup>204</sup> Although it is not binding on corporates to participate in this platform, it is considered a massive step to influence other regions and states.

### B. Substantive Considerations

Substantive considerations are the rationale behind the choice of form of the regulatory system. Consumer protection is a legitimate substantive objective of the Egyptian legislator; however, it lacks proper enforcement in the domain of e-commerce. In contrast to the courts' duty of rights application, the proliferation of private ordering took place to meet consumer needs under the rationale of reaching an efficiency of resolving conflicts in B2C transactions. This contrast calls for inspection of the basis of the private settlement. The argument here is that the objective of private ODR is reaching an amicable agreement instead of applying consumer rights. The adoption of ODR signal the intent of a business entity to secure its reputation rather than a genuine instrument to enforce contractual obligations.<sup>205</sup> So, private ordering aims at solving B2C disputes to meet their consumer interests and avoid litigation costs. Such a different rationale for enforcement imposes limitations on the reliability and credibility of private ordering as an alternative for public enforcement. The distinction here is that public enforcement is based on law application while Private ordering aims at attaining consumer satisfaction. The Adobe Inc. example may illustrate this argument. The settlement reached in that case was based on the contract

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<sup>203</sup> *Supra note*, at 187.

<sup>204</sup> See <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>

<sup>205</sup> Richman, Barak D. "Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering Essay." *Columbia Law Review* 104, no. 8 (2004): i-2368.

and not my consumer rights. The standard for resolving the conflict was the provisions of the contracts and not the consumer rights stipulated under the Egyptian CPL. This contrast illustrates that private tools are not equivalent to state courts. Instead, private ordering represents a slice of the consumer's right to proper access to remedy. This limitation does not undermine the power of private ordering in providing consumers with an efficient remedy for their concerns. Nonetheless, this contrast is a clarification of the limited access to remedy through private ordering in proportion to what the consumer actually deserves. Access to legal remedy is a constitutional right that is granted in the majority of the legal systems; nonetheless, under the domain of e-commerce, consumers are deprived of that right by the power of unjust contractual terms that become the norm of business practice without proper state intervention to ensure the protection of consumer rights.<sup>206</sup> Although there is valuable consumer legislation in place to protect consumer interests, enforcement is minimal in e-commerce. The controversy lies in the establishment of a sophisticated system of consumer protection that is enforced by non-legal private firms. The conclusion here is that both public and private enforcement are based on different standards. Accordingly, the methods adopted by private order are not equivalent to access to state courts. Rather private order methods represent a portion of the consumer rights.

### C. Institutional Considerations

Private sector leadership is promoted in the domain of consumer protection by state policy and international organization recommendations.<sup>207</sup> The shift from public to private enforcement is evident and unavoidable in light of the circumstances of the electronic transaction. The private institution seems to offer higher transactional assurances than public enforcement.<sup>208</sup> The structure of private- regulatory measures fits the nature of e-contract; but poses the following limitations on its application: technological difficulties, fragmentation, lack of resources, and consumer unawareness. First, access to private ODR is hindered by technological difficulties including the ability to understand foreign languages, to use e-mail/chats and related programs and software. The ability of Egyptian

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<sup>206</sup> Constitution of the Arab Republic of Egypt (2014), Article 97, stating that “litigation is a right that is safeguarded and an inalienable right for all. The State shall guarantee the accessibility of judicature for litigants and rapid adjudication on cases”

<sup>207</sup> OECD, “ Guidelines for consumer protection in the context of E-commerce”

<sup>208</sup> *Supra note*, at 199.



consumers to engage in technological processes requires a wide range of skills that are not fostered in the Egyptian shopping environment. Second, the fragmented nature of private ordering refers to the different schemes offered by different entities with no clear path of the process. The lack of coherence between the private order providers and the requirement of voluntary action from the business entities contributes to the lack of transparency of private ordering given that it is based on fragmented institutional enforcement without any mandatory public power or state control; especially in the case of B2C claims. The third limitation is the lack of resources that are required to implement mechanisms of technological and cross border nature.<sup>209</sup> The last limitation to the access to private order is the consumer unawareness of the existence of these mechanisms.<sup>210</sup> Although private order seems an efficient mechanism for resolving B2C conflicts, it is not easily accessible for the majority of Egyptian consumers due to the difficulties associated with language and awareness. In conclusion, self-regulatory measures offer a tailor-made solution for the E-contract problems in terms of its multi-jurisdictional and technological aspects. However, it falls short in resembling a trustworthy equivalent for state courts to enforce consumer rights. Reasonably, Private ordering is an efficient mode of resolving B2C conflicts in a manner that preserves the efficiency of the transaction by satisfying consumer concerns.

In short, this part assessed the practicality of the private self-regulatory measures in the Egyptian marketplace. Private ordering has several advantages that can be summarized in the following two points; it overcomes the technological and transnational nature and provides a convenient tool in time and cost. However, they have limitations that can be summarized in the following four points; technological difficulties and imbalance, fragmentation, lack of resources, and consumer unawareness.<sup>211</sup> The gap between legislations and enforcement calls for reforms to increase the level of protection for E-

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<sup>209</sup> J. Hill, Cross-Border Consumer Contracts 9 (2008)

<sup>210</sup> United Nations, United Nations Conference on Trade and Development, E-Commerce and Development Report 2003, Chapter 7 Online Dispute Resolution: E-Commerce and Beyond (2003), available at [unctad.org/en/Docs/ecdr2003ch7\\_en.pdf](http://unctad.org/en/Docs/ecdr2003ch7_en.pdf)

<sup>211</sup> *Supra note*, at 7.

consumers. The traditional dichotomy of private and public enforcement is proved to be inefficient in standing against the market imbalances and failures.

“The public-private distinction must be understood as a foundational paradox inherent in any reference to a legal right. Its paradoxical nature lies in the fact that on both sides of the distinction the other will always reappear; that is, there is no public without the private, and vice versa.”<sup>212</sup>

In that sense, there is no efficient solution for the problem of E-contract unless it connects between the public power and private institutions. Accordingly, the solution should be a hybrid system between the private institution and the public authorities to reach an enforceable and practical solution to that problem. Also, the consumer economic behavior and technological nature should be accounted for in any proposed mechanism to reach the compromise between fairness and certainty.

#### D. Reforms in the Egyptian Regulatory Model

The prior sections demonstrated the difficulties in handling online B2C transactional claims of relatively low economic value under the Egyptian public enforcement system, which calls for several reforms to deal with the E-contract including the technological and cross-border nature of the disputes. In this section, a pragmatic approach shall be proposed given that the international organizations have already developed several guidelines on consumer protection in E-commerce and best business practices in this domain.<sup>213</sup> The gap in the Egyptian regulatory model arises from two deficiencies: first, the complexity of the public enforcement mechanism, and second the consumer cognition and literacy. Those deficiencies hinder the enforcement of consumer rights; whereas the facts on hand are two folds; first, there are consumer rights stipulated under domestic legislation, and second, there is private ordering that is convenient for the nature of e-contract. So, the proposal is the linkage between the CPA, state governed institution to handle the regulations and enforcement of consumer rights, and the private sector methods of regulation. Thus, the reforms capitalize on the functions of CPA in the Egyptian market. Technology is an indispensable part of our lives, that changes our perceptions of laws and regulation and

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<sup>212</sup> *Supra note*, at 57.

<sup>213</sup> See Organisation For Economic Co-Operation And Development (OECD), *Guidelines For Consumer Protection In The Context Of Electronic Commerce* (2000), And United Nations Conference On Trade And Development (UNCTAD), *United Nations Guidelines For Consumer Protection* (2015).

ultimately the way consumer disputes are resolved. So, it should be well situated in the regulatory approach. Having said that, the reform shall take the form of public control over the private ordering by capitalizing on the functions of CPA and creating a public ODR system. Egypt may adopt an online public hub to generate data and help understand the problematic areas, and propose preventive solutions for future e-commerce disputes. It builds on the easy access and low cost of online portals to provide smart solutions through electronic platforms for arbitration and mediation. ODR processes also may use translation software to allow for multilingual procedures involving parties from various countries.<sup>214</sup> The language differences may be considered a major problem in F2F communication, however, in the ODR, the new technologies and programs shall be used to offer automatic languages' translation to provide consumers with an instant explanation of the conversation.<sup>215</sup> The CPA' system of ODR will offer the following three features:

1. Accessibility: ODR is an easily electronically accessible hub without the need for F2F communication. ODR system should provide simple forms for consumers to file using their native language.<sup>216</sup>
2. Efficiency: ODR is effective means of dispute resolution in cost and time. ODR helps consumers to avoid the potentially long procedure and litigation costs following the application of the choice of forum clauses included in e-contracts. This type of restriction designates the seller domicile or familiar jurisdiction as the chosen venue in case of litigation and arbitration far from the consumer's domicile. On contrary, the ODR provides a higher level of flexibility and convenience in terms of both time and place from anywhere, thereby avoiding the time differences and distance between states and the parties involved.<sup>217</sup>
3. The quality of B2C resolution: the ODR system will promote compliance with CPL standards and not mere amicable settlement. The quality of the settlement is

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<sup>214</sup> *Supra note*, at 7.

<sup>215</sup> Durovic, M. "International Consumer Law: What Is It All About?" *Journal of Consumer Policy* 43, no. 1 (March 1, 2020): 125–43.

<sup>216</sup> *Supra note*, at 7.

<sup>217</sup> Cortés, Pablo. "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers." *I. J. Law and Information Technology* 19 (March 1, 2011): 1–28.

improved given the consumer's negotiations will be based on legal grounds and not negotiations based on the expertise of the contractual provisions.<sup>218</sup>

Moreover, reports of the outcome of the ODR shall be published so that other traders and consumers can adjust their practices to the new cases. This tool will empower the Egyptian consumer with information on what to avoid in e-commerce and how to seek remedy. The ODR participants will be perceived as trusted sellers and online platforms which will incentivize participation. Moreover, the collection of the data regarding the disputes will help in generating a list of problematic provisions to be avoided in E-contract regulation. The main hurdles to the realization of the public ODR system in Egypt are the limited resources of the CPA and the participation of businesses and consumers. As Egypt is keen on being part of the digital economy, the limited resources may be overcome by state policy to invest in technological infrastructure and outsourcing neutral private technical entities to design and manage the system. Regarding, the limited participation of the business and consumer, it may be overcome by promoting the importance of this step and providing easy access for consumers.

Overall, this proposal is a practical step to monitor and collect data to help the Egyptian legislator moving forward. The assumption that the market will correct its failure by consumer actions is not valid in Egypt as a large segment of the Egyptian consumers are not aware of their rights and the availability of seeking a remedy. This suggests that CPA, as representative for consumers, should take the lead and capitalize on the collected information from the ODR to direct the legislator's attention to the main problematic areas in E-commerce to enjoy the benefits of the online mode of trade.

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<sup>218</sup> Eidenmueller, Horst G. M., and Martin Engel. "Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe." *SSRN Electronic Journal*, 2013.

## V. Conclusion

The fundamental inequality in B2C contracts requires a policy shift towards consumer protection given that the current direction led to positioning all the Egyptian consumers at stake. Consumer protection is a novel area of legislation in Egypt that started only 15 years ago; however, it has a widespread effect on all of us. It changes the daily life activities in conducting online purchase transactions. There is no sufficient attention directed to strengthen the enforcement of consumer rights although this field of legislation affects all of us with no exception. Additionally, consumer protection has a significant economic distributional effect that requires Egypt to have a second look at privileging consumers' rights. As highlighted earlier the Egyptian consumer needs to feel protected while conducting online activities to participate and take a fruitful part in the digitalization era which Egypt is carrying on. The Egyptian government should seize the opportunity to foster the market institutions to respect consumer rights for these reasons; 1) consumer protection is a concept well-rooted in the Egyptian jurisprudence of protecting the weaker parties in contracts; 2) higher protection standards expand consumer access to e-commerce; 3) consumer protection reflects a reasonable moral objective of protecting the weaker party from abuse of rights.

So, this paper is a tool to shed the light on the legal background of consumer protection in e-commerce. The B2C relationship rules are set by the e-contract; So, we presented a thorough analysis of the problematic nature of e-contract compared to that of ordinary contract. Then, chapter 2 focused on executing the conflicting consideration model on the Egyptian regulatory model concerning the consumer's level of protection to conduct electronic transactions smoothly. The law in Egypt seems to be inadequate to ensure the enforcement of consumer rights through public institutions. The E-contract is administrated by the business firm's strategy. The state's institutional capacity to handle the consumers' problem is impaired by the virtue of restrictive provisions in the E-contract which directs the responsibility of resolving disputes to private institutions to avoid the uncertainty and transactional costs of public courts. As a result, consumer rights enforcement is at stake given that it is administrated by the private institutions that aim to resolve consumer claims for their best interests instead of the reference to the national consumer protection law. Hence, the Egyptian legislator should opt to create public ODR as an out-of-court dispute resolution forum to further develop an accessible portal to raise e-commerce claims, and; accordingly, a more advanced and secure environment for consumers to conduct electronic transactions. This proposal is designed to boost the Egyptian consumer's interaction in e-commerce which will result in economic growth and a higher confidence level in E-commerce security.