

## Good Faith and Unfair Terms

### 7.1 INTRODUCTION

In other chapters, we examined how party autonomy shapes the parties' contractual relations. Indeed, party autonomy is the cornerstone of the law of contracts, and in general terms, the law intervenes in this process only sparingly with mandatory rules. In this chapter, we examine those circumstances where the civil law (both the CC and special laws) not only intervenes but invalidates the parties' express consent on the ground that their agreement lacked good faith or imposed unfair terms on the weaker party. This is an unusual mechanism that is justified to avoid injustice and exploitation<sup>1</sup> against one of the parties (unfair terms), typically arising in relation to adhesion or consumer contracts. The imposition of good faith is equally justified by reference to public policy even if not expressly spelt out. This 'parental' regulation of contracts is not without contention, and as the reader will come to realise, the contours of the application of good faith differ among jurisdictions, although our emphasis here is on the Qatari experience.

### 7.2 GOOD FAITH

Just like other legal systems, the Qatari CC does not attempt to define good faith. Its meaning is assumed to be self-evident. There are numerous provisions in the CC that refer to good faith, although the majority concern the law of property and not contracts. There are certain issues of contention but what is absolutely clear is that good faith is a foundational principle of Qatari private law; yet, it does not seem to be absolute and may be waived under certain

<sup>1</sup> These grounds were also encountered in the context of defective consent, particularly Arts 140–147 CC. See Chapter 8 for a more comprehensive discussion.

circumstances, as explained below. In a case concerning the construction of a building outside (or contiguous to) the limits of the owner's property (land), thus, taking up part of the neighbour's land, the Court of Cassation was asked to determine whether the building should remain – subject to fair compensation – under the condition that the owner was in good faith concerning the boundaries of its own land. The Court of Cassation agreed with the Court of First Instance in that the meaning of good faith in article 916 CC requires the building owner, while building, to possess an absolute and justified belief that it is doing so in its own land and not trespassing in the land of its neighbour. This, in turn, entails that it has exerted all habitual effort to verify the borders of its own land and not made a mistake out of rashness, indifference or negligence.<sup>2</sup>

Unlike article 1104(1) of the French Civil Code, which stipulates that contracts must be negotiated, formed and performed in good faith, article 172(1) of the Qatari CC points out that good faith concerns the performance of contractual obligations.<sup>3</sup> The inspiration behind this provision is the Egyptian Civil Code of 1948.<sup>4</sup> What this excludes from the scope of article 172(1) CC is the application of good faith in the phases of *negotiation* and *formation* of the contract. It might well be that Islamic law recognises a role for good faith in the pre-contractual formation phases, chiefly the parties' negotiations.<sup>5</sup> However, it should be pointed out that Islamic law and business custom are supplementary sources to the primacy of the CC.<sup>6</sup> They are only applicable where the CC is silent on a particular issue. In the opinion of the authors, article 172(1) CC is not silent on this issue; rather, it purposely excludes the application of good faith from all pre-contractual phases, thus, rendering this a matter for party autonomy. The pertinent provisions in the Qatari CC dealing with the formation of contract are deemed sufficient to deal with bad faith, in the sense that if the offeror were to grossly misrepresent the quality or quantity of

<sup>2</sup> Court of Cassation Judgment 10/2008.

<sup>3</sup> This, of course, is hardly unusual and most legal systems apply the same principle. See Art 242 BGB.

<sup>4</sup> Art 148(1) Egyptian CC; see also Art 129 Bahraini CC; Art 197 Kuwaiti CC; Art 246 UAE CC.

<sup>5</sup> See N Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah', (2004) 20 *Arbitration International* 97. In fact, evidence suggests that Islamic law requires good faith during negotiations too. This is generally derived from a number of *hadith*, namely: 'a person does not believe until he prefers for his brother what he prefers for himself, which is construed as requiring fair dealing and diligent examination of terms and conditions of a sale. It is equally forbidden to conceal or misrepresent the qualities of a good. See Muslim bin Hajjah, 'Ṣaḥīḥ Muslim, Book of Faith' No. 459; equally, Al-Bukhari 3/67, concerning the narration of a negotiation for the purchase of a camel.

<sup>6</sup> Art 1(2) CC.

the good or service that is the subject matter of the contract, there would be a dissensus between the offer and acceptance. As a result of such dissensus, no contract would come about. Misrepresentation during negotiations may in turn give rise to a tort where harm was caused to the offeror or offeree.<sup>7</sup>

Article 172(2) CC expands the good faith requirement by stating that obligations arising from a contract encompass, in addition to what the parties have agreed, whatever ‘is required by law, customary practice and justice’ in accordance with the nature of the obligations in the contract. This no doubt covers industry practices, such as commercial custom,<sup>8</sup> as well as fair dealing in accordance with the law and accepted public policy. The importance of public policy in this regard will be examined in a subsequent section dealing with party autonomy to exclude or waive good faith in contractual relationships. The two following subsections will deal with subjective and objective good faith.

### 7.2.1 *Subjective Good Faith*

Subjective good faith generally refers to a person’s state of mind by which to ascertain whether or not that person knew or had reason to know of a certain fact. A person possessing actual or other knowledge about a fact and yet acts or behaves as though it did not have such knowledge is said to be acting in bad faith. Article 800 CC is a good illustration of the law requiring good faith by the stronger party to a transaction. There, it is stipulated that the ordinary three-year prescription period for insurance claims does not arise where the insurer fails to provide information in its possession concerning risk.<sup>9</sup> The law generally posits certain consequences to bad faith of a subjective nature. Article 165(1) CC notes, for example that the invalidity of title-transferring contracts shall not be effective against a special successor receiving a right in kind from either contracting party, provided that such successor received such right as indemnity in good faith. A special successor is considered as acting in good faith if at the time of the transfer, it ‘was not aware of the reason for revoking the contract of its predecessor and could not have known of such reason if the successor exercised prudent and reasonable judgment’.<sup>10</sup> Equally, article 226 CC stipulates that where a person receiving a pre-payment acts

<sup>7</sup> See Arts 199–219 CC.

<sup>8</sup> The Court of Cassation has consistently held that interest rates shall be upheld in accordance with prevailing business custom. See Judgments 66/2014; 40/2013 and 208/2014.

<sup>9</sup> See Court of Cassation Judgments 141/2015; 36/2015 and 182/2016.

<sup>10</sup> Art 165(2) CC. See equally Art 186 CC.

in good faith, such person shall not be required to repay any further amount other than that which was prepaid. If, however, such person is found to have been prepaid in bad faith, it shall be obliged to repay any benefits, in addition to the prepaid amount. The Court of Cassation has further ruled that an employer slurring or defaming an employee with a view to avoid paying end of service gratuity is acting in bad faith.<sup>11</sup> As a rule, therefore, subjective good faith operates to validate an action or transaction.<sup>12</sup>

Conversely, subjective bad faith invalidates (after the act) the act or transaction. This is in line with the Court of Cassation's emphasis whereby an aggrieved contractual party can only seek damages for harm that it could have avoided or in respect of which it could have taken reasonable steps.<sup>13</sup>

Another important function of subjective good faith is to deter abuse of right and, hence, act as a form of estoppel against said abuse of rights.<sup>14</sup> This principle is entrenched in several provisions of the Qatari CC,<sup>15</sup> including article 132, and has equally been enunciated by the Egyptian Court of Cassation,<sup>16</sup> and the Qatari Cassation Court.<sup>17</sup> This states that a party whose consent was the result of a mistake may not insist on such mistake in a manner contrary to the principle of good faith. Equally, article 333 CL emphasises that a broker may not request a fee or recover expenses if its actions damage the interests of the contractor instructing him to the advantage of another party for whom it was not acting as negotiator or where he is promised a benefit by the latter contractor, contrary to the dictates of good faith.<sup>18</sup>

Exceptionally, good faith alone is not always enough. In certain circumstances, the law requires a party to a transaction, particularly experts and

<sup>11</sup> Court of Cassation Judgment 50/2012.

<sup>12</sup> See also Art 960 CC; Art 82 CL provides that payment of a commercial debt shall be valid 'if it has been made to a person who possesses a receipt of debt or carries a form of discharge from the creditor and the debtor has acted in good faith. A debtor shall be deemed to have acted in good faith if unaware that the certificate of debt or the discharge form is illegal'.

<sup>13</sup> Court of Cassation Judgment 13/2010.

<sup>14</sup> The invocation of financial distress to terminate a contract or reduce the burden of an existing contractual obligation is poignant in this context. See Court of Cassation Judgment 61/2011, where it reversed the ruling of a lower court which had terminated a lease contract on account of the applicant's financial distress which followed from the global financial crisis. The Court required proof that the crisis had a serious impact on the applicant's finances so as to justify termination or adaptation of the lease agreement.

<sup>15</sup> But chiefly Arts 62 and 63 CC.

<sup>16</sup> Egyptian Court of Cassation Judgment 3473/2006.

<sup>17</sup> Court of Cassation Judgment 176/2014.

<sup>18</sup> At least one commentator suggests that Qatari courts frequently imply good faith obligations in contracts. See M Khayal, *The General Theory of Obligation under Qatari Law*, vol 1 (Qatar University Press, 2015, in Arabic) 248–249.

professionals, to act diligently and in accordance with the precautions required by their industry. In such circumstances, the absence of due diligence cannot be remedied by the presence of good faith. Article 476(3) CC, for example, stipulates that where the buyer's title to property is invalidated by the courts without the buyer's knowledge that the property was in fact owned by a third party, the seller is liable for damages even if he or she acted in good faith as to the ownership of said property.<sup>19</sup> Equally, article 459 CL notes that obligations assumed by minors not authorised to transfer funds or property, and which obligations arise from their signatures on bills of exchange as drawers, endorsers or in any other capacity, shall be null and void. Such nullity applies in respect of any holder of a bill of exchange, even where the latter has acted in good faith.

### 7.2.2 *Objective Good Faith*

Objective good faith is embodied in article 172(1) CC. Following well-established – although by no means fully uniform – civil law tradition in this respect, article 172(1) CC obliges all parties to a contract to fulfil their obligations thereto in accordance with good faith.<sup>20</sup> This effectively requires that all parties are bound to ensure, to the best of their knowledge and abilities, that the terms of the contract are fulfilled at all times and that they strive towards such fulfilment. Good faith in this sense is best viewed as a form of cooperation and not as an individualistic and self-serving pursuit.<sup>21</sup> By way of illustration, if a party is in possession of information that could assist its counterpart to comply with its obligations under the contract but intentionally omits to convey such information, not only is it unable to rely on the other party's failure, but it itself is also in breach of its contractual obligations, namely, the statutory obligation to fulfil contractual obligations in accordance with good faith. In equal measure, where a party to a contract has contributed (even if not the sole cause) to damages through poor or non-fulfilment of its own obligations, it is not entitled to the full extent of damage that it would otherwise be entitled to.<sup>22</sup> No doubt, if assistance to the other party is required at the expense of

<sup>19</sup> See equally Art 945(1) CC.

<sup>20</sup> It is important here to distinguish between acting in good and nonetheless failing to fulfil contractual obligations. See Court of Appeal Judgment 378/2019.

<sup>21</sup> The Egyptian Court of Cassation in Judgments 4726/2004 and 4733/2004 has emphasised the obligation of all parties to a contract to avoid any third-party communications and all actions that may harm or adversely impact the fulfilment of the contract.

<sup>22</sup> Court of Cassation Judgment 8/2012. This judgment was no doubt inspired by the Egyptian Court of Cassation Judgment 152/1980.

the assisting party, such costs are recoverable. If the cost is detrimental to the assisting party and outweighs the overall benefit from the contract, it would be unreasonable to suggest that its omission to assist is in violation of good faith. Overall, especially in long-term contracts, the parties may not claim damages (or the right to terminate) as a result of breach by the other party, if they were able to avert the breach with or without cost.

The significance of objective good faith in the Qatari civil code should not be under-estimated, particularly since it does not extend to the negotiating (or pre-contractual) phase. No doubt, the courts are at liberty to impute good faith broadly in their construction of contracts and following the Egyptian approach this should extend to administrative contracts.<sup>23</sup>

### 7.3 WAIVING GOOD FAITH

Article 945(3) CC, which refers to possession of property emphasises that ‘good faith shall always be presumed unless evidence to the contrary is provided and unless the law provides otherwise’. Although this provision is unrelated to contracts, it gives rise to an important principle, namely that good faith may be waived by the parties, at least expressly, save if the law provides otherwise.<sup>24</sup> Such an outcome has expressly been iterated by the Court of Cassation in judgment 10/2008, whose facts have already been set out in an earlier section of this chapter. The Court emphasised that good faith is a rebuttable presumption if there are no reasons preventing such presumption in the first place. Although the Court was specifically referring to article 916 CC, which concerns immovable property, it did not seem to be positing a limited principle and there is no good reason why the rebuttable nature of the presumption should not apply elsewhere in the CC. Some commentators suggest that limitations in the exclusion of certain types of liability, such as article 267 CC, are consistent with good faith, in the sense that a right cannot be exercised unlawfully.<sup>25</sup>

This issue is further complicated by the fact that it is common practice in Qatar for parties to transnational contracts, including administrative contracts, to insert choice of law clauses designating a foreign law, typically English law,

<sup>23</sup> Egyptian Supreme Administrative Court Judgment 303/2006; equally iterated by the State Council, General Assembly for Advice and Legislation, Opinion No. 793/2017.

<sup>24</sup> Adhesion contracts provide a good example. In accordance with Arts 105–107 CC the parties may not, even by mutual agreement, waive the liability of the stronger party or any arbitrary provisions in the contract.

<sup>25</sup> M H Al-Kaabi, ‘Is it Possible to Introduce Efficient Breach Theory to a Civil Law Country? The Case of Qatar’ (2020) 34 Arab LQ 13.

as the governing law.<sup>26</sup> Although this is consistent with international practice,<sup>27</sup> it does give rise to an important question; namely, whether the absence of *implied* (but not express) good faith in English contract law<sup>28</sup> is compatible with the Qatari civil code. The two would only be compatible where the Qatari Civil Code is found to permit the parties to waive or exclude good faith requirements in their contractual undertakings. Given our analysis, thus far, the authors are of the opinion that this is indeed possible, save where such exclusion creates a gross imbalance between the parties and, thus, risks causing a serious harm to one of the parties. General principles of justice would no doubt equally be applicable.<sup>29</sup>

Naturally the same question would be answered differently by English and Qatari courts. It, therefore, requires further analysis from the lens of Qatari conflicts of laws rules. The starting point is article 29(2) CC, which stipulates that the 'law governing the contract in its substantive provisions, the law of the domicile of the contracting parties, or their common national law, may apply'.<sup>30</sup> Two caveats apply with respect to this rule. The first is situated in article 10 CC. It states that 'where a dispute arises in the application of different laws ... the dispute shall be resolved by reference to Qatari law'. This provision is clearly inapplicable where the parties have chosen English law as the governing law of their agreement. The second restriction stems from article 38 CC, according to which a foreign law, even if chosen by the parties, shall not be applied if it is in conflict with Qatari public order and morals.<sup>31</sup> The aforementioned discussion hopefully serves as a basis to argue that the

<sup>26</sup> See I Bantekas, 'The Globalization of English Contract Law: Three Salient Illustrations' (2021) 137 LQR 130.

<sup>27</sup> Even where the governing law of a contract is not English law, the QICDRC still relies on English contract law to flesh out general principles. In *Obayashi Qatar LLC v Qatar First Bank LLC* [2020] QIC (F.) 5, para 90, Qatari law was the contract's governing law. Yet, the court relied predominantly on the English law of demand guarantees, as well as the fraud exception therein, as a condition freeing the debtor from its obligation.

<sup>28</sup> It is impossible to do justice to this subject but see generally *Walford v Miles* (1992) 2 AC 128 and *Chapman v Honig* (1963) 2 QB 502, per Pearson LJ. Even so, good faith has been introduced on the basis of other mechanisms and principles, such as: contracts of utmost good faith, as in *International Management Group UK Ltd v Simmonds* (2003) EWHC 177 (Comm); fiduciary relationships; unfair terms in consumer contracts requiring open and fair dealing, as chiefly expounded in *Director General of Fair Trading v First National Bank* (2001) UKHL 52 and; where English courts have accepted that good faith is part of English law through EU law and principles: *Yam Seng Pte v International Trade Corp Ltd* [2013] 1 All E.R. (Comm.) 1321, paras 119–154, but especially para 24.

<sup>29</sup> See Art 1(2) CC, which refers to justice, business custom and Islamic law as supplementary sources to the primacy of the CC.

<sup>30</sup> See Art 27(1) CC concerning contracts containing no choice of law clause.

<sup>31</sup> See Court of Cassation Judgment 226/2012.

CC is supportive of excluding good faith under certain circumstances, and no Qatari court has ever rejected the application of English law on the ground that its stance on implied good faith is contrary to Qatari public policy and public morals.

#### 7.4 UNFAIR TERMS IN CONTRACTS

Qatari law, generally speaking, aims to strike a reasonable balance between the parties' reasonable expectations, respect for public policy and justice,<sup>32</sup> while at the same time ensure that the weaker parties' obligations are not grossly imbalanced. In this respect, it is no different to the same set of aims set out by the common law and civil law traditions. This section is chiefly focused on adhesion and consumer contracts, albeit the same principles apply to all contracts, *mutatis mutandis*. Qatari judicial practice clearly suggests that certain commercial contractual practices are unfair, as is the case with receiving compensation for the same loss more than once (so-called double recovery).<sup>33</sup> Although it is beyond the scope of this book to focus on employment contracts, it suffices to say that labour relationships are subject to several public policy limitations. This includes among others: labour rights, particularly the restricted right to termination by the employer<sup>34</sup> and the prevalence of the employment contract over and above the employer's bylaws.<sup>35</sup>

The discussion in the beginning of this chapter, dealing with good faith, is very much relevant to the application and construction of unfair terms in contracts, particularly consumer contracts. Good faith plays a central role in the construction of such contracts,<sup>36</sup> because the law requires the more powerful party to avoid exclusion or limitation (of liability) clauses that cause significant harm to the weaker party, especially where the latter possesses little, or no, bargaining power. Agreements entered under such circumstances are known as adhesion contracts and the terms effectively imposed by the stronger

<sup>32</sup> Art 1(2) CC provides a hierarchy of sources, with statute at the apex, followed by the Sharia ('if any'), customary practices and finally 'rules of justice'. See Court of Cassation Judgment 122/2013 on the limitations of justice as a rule that is trumped by the mutual intention of the parties; see equally Court of Cassation Judgment 26/2015.

<sup>33</sup> See N Mahasneh, 'Delay Damages: The Application of Qatari National Law to Article 8(8) of the 2017 Red Book' (2020) 34 Arab LQ 10.

<sup>34</sup> Court of Cassation Judgments 44/2010 and 73/2010.

<sup>35</sup> Court of Cassation Judgment 32/2011.

<sup>36</sup> For the position in Islamic law, see M Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law: A Comparative Analysis' (2014) 28 Arab LQ 205.



party are standard terms<sup>37</sup> (and conditions). It is not always easy, however, to draw the line between economic disparity that gives rise to an adhesion contract and disparity that does not. The discussion is crucial, of course, because if a particular type of contract is not considered adhesive, then an otherwise arbitrary or unfair term would be valid. Insurance contracts offer an excellent illustration. There is clearly a significant financial disparity between the insurer and the insured, but this is not always the case, and in any event, it is not always compulsory to take out insurance. The Court of Appeal has iterated that in case of doubt, insurance contracts must be viewed as adhesion agreements under the terms of article 107 CC.<sup>38</sup> On the contrary, Qatari courts have viewed other contractual relationships involving some form of standard terms as not satisfying the requirements for adhesion contracts. This is true particularly in respect of real estate agreements,<sup>39</sup> interest in loan agreements<sup>40</sup> and sales terms restricting the buyer's right to damages.<sup>41</sup> This is also the case with respect to the obligations of guarantors to another person's loan or the imposition of interest for delayed payments.<sup>42</sup> The Court of Cassation has recognised these obligations as stemming from business custom.<sup>43</sup>

One of the ways through which the CC counters unfair clauses is by requiring sign-posting of the adhering party's statutory rights in the adhesion contract. By way of illustration, article 778 CC requires the insurer to insert a

<sup>37</sup> Standard terms are not defined in the CC. Art 1110 of the French CC defines 'standard form contracts' as contracts whose general conditions are determined in advance by one of the parties without negotiation. See N Mahasneh, 'Standard Terms Contracts: The Approaches of the Qatari Civil Law and the UNIDROIT Principles 2016: A Comparative Study' (2018) 32 Arab LQ 462.

<sup>38</sup> Court of Appeal Judgment 1272/2015. See also Arts 775 and 775 CC, which address void terms and conditions in insurance contracts, as well as a variation of the *contra preferentum* rule.

<sup>39</sup> Court of First Instance (CFI) Judgment 114/2016, cited in Mahasneh (n 37) 473. In one case involving a real estate transaction, the Court of Cassation (Judgment 74/2011) noted that consumers may not reject unfair and unjust conditions in adhesion contracts. This seems an aberration and does not count as good law.

<sup>40</sup> CFI Judgment 114/2016, *ibid*, 474.

<sup>41</sup> Court of Cassation Judgment 74/2011.

<sup>42</sup> s 110 of Decree Law No 33 of 2006 on the Qatar Central Bank.

<sup>43</sup> The Court of Cassation does not shy away from identifying business custom through standard phraseology. For example, in Court of Cassation Judgment 148/2010, it held that the bank's exposure to the lender is significant and hence compensation for late payments (delay interest) is justified by reference to banking custom, which is moreover 'common knowledge' that does not require proof; equally Court of Cassation Judgment 220/2011; to the same effect see also Court of Cassation Judgments 40/2013 and 107/2013, where it was stated that where a special commercial/trade law is silent 'commercial custom shall be applied, with the special custom or local custom being given precedence over the general custom. If there is no commercial custom, the provisions of the civil law shall apply'. This was also reiterated in Court of Cassation Judgments 66/2014; 371/2014 and 208/2014.

provision in insurance contracts exceeding five years that termination takes effect every five years by a six-month notice to the other party.

Article 105 CC underscores the inherent imbalance of power in adhesion contracts, acknowledging in the process that the absence of negotiations as a result of the stronger party's (effective imposition of) standard terms does not entail that the other party has not expressed its acceptance of the offer.<sup>44</sup> This is known as the *incorporation problem*. Following well-established civil law tradition,<sup>45</sup> article 106 CC goes on to emphasise that adhesion contracts may not contain arbitrary terms and where they do the adhering party may request the courts to expunge them fully. This is true even where the adhering party was aware that the term was arbitrary.<sup>46</sup> In most cases, the adhering party will be aware of the arbitrary nature of the underlying standard term but will have little practical choice in the matter. Clearly, therefore, arbitrary contractual terms in adhesion contracts are prohibited as a matter of public policy and the adhering party's knowledge is not considered an abuse of right.<sup>47</sup> It is not surprising as a result that article 106 CC prohibits any agreement to the contrary; that is, the parties are not at liberty to agree that such terms shall remain in force. There is no definition as to what constitutes 'arbitrary' terms, but at the very least, this encompasses clauses that produce a gross imbalance to the interests of the adhering party, as well as those that exclude or limit the liability of the stronger party.

#### 7.4.1 *Exemption Clauses*

That the law allows stronger parties to effectively impose standard terms does not mean that said terms can contain arbitrary conditions, including those that exempt the stronger party from full or partial liability, all of which are detrimental to the interests of the weaker party. Qatari law curtails the use and validity of exemption clauses in several ways. As explained elsewhere, article 170(2) CC posits the general rule, according to which if the contract contains

<sup>44</sup> See Court of Appeal Judgment 241/2010; Court of Cassation Judgment 74/2011.

<sup>45</sup> The revised French CC, which was a source of inspiration for the Qatari CC, provides in Art 1170 that terms which serve to deprive the debtor's essential obligation of its substance are invalid. Art 1171 of the French CC produces the same result in respect of terms that create a significant imbalance to the parties' rights and obligations.

<sup>46</sup> Commentators argue that this is in contrast to the historical predecessor of Art 106 CC, namely Art 148 Egyptian CC, which does not address the adhering party's knowledge of the arbitrary term. See Mahasneh (n 37) 478.

<sup>47</sup> See Court of Cassation Judgment 17/2012, where it was held that a guarantee for a future obligation under Art 1812 CC is invalid, unless the two parties specify in advance in the guarantee contract the amount of the debt guaranteed by the guarantor.

a clause discharging a party from liability, such provision shall be construed narrowly. Article 24 of the 2008 Consumer Law is expressed in more absolute terms. It states that

Any condition referred to in a contract, document, or other similar instrument in respect of contracting with the consumer shall be null and void where such condition relieves the supplier of any of his obligations stipulated in this Law.

Suppliers (businesses or stronger parties to adhesion contracts) cannot impose blanket exemptions from liability clauses in their contracts with consumers. Their duties as suppliers towards consumers are prescribed by law<sup>48</sup>, and hence, because they are statute based, they may not be exempted by contract. Article 3 of the Consumer Law further provides that the consumer shall be entitled to fair compensation for any property or financial damages sustained as a result of the purchase or use of commodities and services. Any contrary agreement between consumer and supplier shall be deemed null and void.

A poignant illustration is also offered in articles 801 and 802 CC which stipulate that insurance contracts may not impose conditions that are not in the best interests of the insured or beneficiaries, including extending or decreasing the applicable period of prescription.<sup>49</sup>

#### 7.4.2 *Incorporation*

We have slightly touched on the incorporation problem in the previous section, but it is worth further analysis because of its importance to contractual fairness and the debates it has given rise to in other jurisdictions. The key question is to what extent standard terms should be notified and made clear to the adhering party. To illustrate its importance, it is instructive that under German law, if a term contained in standard terms is so unusual that the other party would not have expected to encounter it, it is deemed inapplicable.<sup>50</sup> In similar vein, Lord Denning, as far back as 1956 demanded that the more unreasonable a standard clause is the greater the notice which must be given

<sup>48</sup> See, for example, Art 12 Consumer Law, which concerns a duty to include in consumer contracts details about returns, repairs and maintenance; see also Art 789 CC, which provides that any agreement in insurance contracts by which to discharge the insurer from his obligation to notify the insured or to shorten the time of suspension or termination notices is null and void.

<sup>49</sup> See Court of Cassation Judgment 140/2014, which held that a clause in the insurance contract that did not guarantee loss or damage of the insured object as a result of repairs undertaken was invalid.

<sup>50</sup> Art 305(c)(1) BGB.

of it.<sup>51</sup> This is known as the *red hand rule*, because Lord Denning jokingly suggested that such a clause would need to be printed with a red hand pointing to it. We have already examined how article 106 CC tackles the incorporation problem by prohibiting arbitrary terms. This is hardly enough, however. Article 80(1) CC stipulates that where the contracting parties agree to standard terms and conditions, such terms shall apply ‘unless any party proves that they had no notice of such provisions, or had no opportunity to discover them at the time of the agreement’. Paragraph 2 of article 80 CC continues by saying that where standard terms of which no notice has been taken are essential, the contract shall be invalid. ‘If the provisions are auxiliary, the courts shall resolve any dispute arising therefrom in accordance with the nature of the transaction, current usage and the rules of justice’. As a result, conspicuous or unexpected general conditions are not binding on the weaker party, unless drawn to its attention in a manner that renders them fully noticeable. The subsequent section on fairness provides more insights on the notice requirements generally demanded, or which should be demanded.

#### 7.4.3 *Interpretative Rules for Assessing Unfair Terms*

The policing of contractual fairness requires appropriate construction/interpretation by the courts in order to counter the deficiencies associated with the incorporation problem and the use of standard terms. Qatari law has adopted most construction principles developed in the common and civil law traditions. Article 107 CC goes on to establish the so-called *contra preferentum* rule, according to which an ambiguous term in an adhesion contract shall always be construed in favour of the adhering party. It is, therefore, in the interest of the stronger party to clarify the content of its standard terms, in accordance with the analysis in the previous section. This allows for fairer contracting. In one case, the applicant had acquired a credit card from a bank and withdrew large amounts. The bank treated its agreement with the applicant as a loan agreement, rather than a credit card agreement, and imposed significantly larger amounts of interest on withdrawals. The Court of Cassation found this to be contrary to pertinent business custom and restored the parties’ contractual relationship to that of a credit card agreement.<sup>52</sup>

Article 170(1) CC takes the mantle even further by providing that if doubt arises as to the wording or meaning of words or phrases in the contract, these shall be construed in favour of the obligor. Where, however, the contract

<sup>51</sup> *Spurling Ltd v Bradshaw* (1956) 1 WLR 461.

<sup>52</sup> Court of Cassation Judgment 107/2013.

contains a clause discharging a party from liability, such provision shall be construed narrowly.<sup>53</sup> Paragraph 2 of article 170 must be read alongside article 160 CC and consumer legislation.

### 7.5 FAIRNESS

The question of fairness is central to the enforcement of unfair clauses in consumer contracts. While the 2008 Consumer Law and CC provide general guidance that arbitrary terms will be invalid, as well as that unfair exemption clauses will suffer the same fate, the courts would have to assess each claim anew. It is for this reason that most jurisdictions in Europe, as well as the EU, have set out lists of unfair terms. Although several variations exist, these are typically distinguished between terms falling within *grey lists* and *black lists*. Terms in grey lists may be binding if they do not encompass disproportionate obligations. Terms in black lists can under no circumstances be considered binding.<sup>54</sup> Under Qatari law, there are no grey or black lists for consumers and the courts to rely upon, and hence, much will depend on the particular content of terms in adhesion contracts, as well as the attitude of the courts in construing arbitrariness and good faith in such contracts. A good illustration may be derived by the rights of guarantors against the debt of a third party. The Court of Appeal has made it clear that the guarantor has the right to warn the creditor to take measures against the debtor (when the debt is due) within six months from the date of the warning, and failure to do so clears the guarantor and the surety contract expires unless the debtor provides a sufficient guarantee.<sup>55</sup>

<sup>53</sup> Art 170(2) CC.

<sup>54</sup> See Arts 308 and 309 BGB; Arts R 212-1 and R 212-2 of the French CC; Annex [to Art 3] of EC Directive 93/13 on Unfair Terms in Consumer Contracts.

<sup>55</sup> Court of Appeal Judgment 54/2018.