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The Legal Characteristics of Consumer Arbitration Clause and Defenses in the U.S. Contract Laws*

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The U.S. Supreme Court delivered a decision on the case between AT&T and Concepcion, which confirmed the contractuality of a defense as a threshold to distinguish between what is a viable defense for invalidation of consumer arbitration agreement and what is not. In this paper, the adhesiveness of arbitration clause, which is a unique character for consumer arbitration, is investigated in the U.S. as a legal defense to invalidate the consumer arbitration agreements, and its contractualityand related legal doctrines are analyzed. The legal issues of consumer arbitration have been analysed in several legal perspectives including the voluntary, knowing and intelligent doctrine, doctrine of separation, contract of adhesion and the contractuality of defenses. Among all of these, the first three issues are related with arbitration clause, and the last one, the contractuality of defenses, reflects the nature of defenses invalidating the consumer arbitration agreement.

Key Words : Consumer Arbitration, Arbitration Agreements, Contract of Adhesion, VKI Doctrine

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I. Introduction

Consumer arbitration agreement, which refers to an agreement to arbitrate between the individual consumer and the business corporation, has been popularized to resolve disputes between consumers and businesses in the United States. Recently, deep interest has been evoked to promote consumer arbitration in Korea and several studies have been conducted to introduce consumer arbitration practices into Korea.[1)]

Although consumer arbitration is a popular way to resolve consumers' disputes with businesses, it still remains unsettled whether consumer arbitration is superior to litigation in terms of protecting consumers against a business.[2)]

Two aspects of consumer arbitration have made it riskier to consumers than consumer litigation. First, the consumer arbitration agreement is generally formed with an adhesion contract. If an arbitration clause is provided with a number of other terms in the contract, the consumer may overlook the legal effects of the arbitration clause entailed by the main contract. The second risk of consumer arbitration is that the individual consumer tends to be put into a weak bargaining position due to lack of experience in arbitration with the business that usually has more financial and legal resources to deal with their consumers.[3)]

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1) Choong-Lyong Ha, "Contract Defenses in Consumer Arbitration Agreements", 「Journal of arbitration studies」, v.20, n.1. 2010, pp. 151-171.; Choong-Lyong Ha, "The VKI Doctrine in Consumer Arbitration Agreements", 「Journal of arbitration studies」, v.21, n.3, pp. 165-187 (2011).; Also working paper, Review on the Adhesiveness of Consumer Arbitration Agreements - The U.S. Laws, 2012.; Suk-Chul Kim, "A Study on Consumer Arbitration System by Empirical Analysis on Redemption for Consumer's Claim", 「Journal of arbitration studies」, v12, n1, 2002, pp. 207-239,; Sung-Yong Park, "A Study on the Possibility of Introducing Arbitration Program to Consumer Dispute Resolution System", 「Journal of arbitration studies」, v.19, n.2, 2009, pp. 73-94.

2) Meredith R. Miller, "Contracting out of Process, Contracting out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process". 75 Tenn. L. Rev. 365, 2008, p.404. Richard M. Alderman, "Consumer Arbitration: The Destruction of The Common Law", 「Journal of American Arbitration」, v.2,n.1, 2003, p.2 (Stating that "the recent movement to impose mandatory predispute arbitration in an increasingly large number of consumer contract, however, threatens to eliminate this "fundamental" branch of government, substituting a system of private, often secret, justice, not bound by precedent and unable to create it.";)

3) Sun-Joo Jung, "Protection of Consumer in Consumer Arbitration", 「Seoul National University Law Review」, v.49, n.1, The Legal Research Institute of Seoul National University, 2008,

Several papers have addressed the issues of protection of consumers in arbitration agreements.[4] Jung (2008) raised the issue of protection of the individual consumer in consumer arbitration, suggesting that the duty to explain the meaning of arbitration clauseshould be imposed to the business. Most recently, Ha (2010) investigated the contract law defenses on consumer arbitration agreements in the U.S. However, all of these papers have not led to a firm conclusion on what would be a converging legal issue to protect individual consumers through the invalidation of consumer arbitration agreements.

Meanwhile, the U.S. Supreme Court delivered a decision on the case between AT&T and Concepcion,[5] which confirmed the contractuality of a defense as a threshold to distinguish between what a viable defense for the invalidation of consumer arbitration agreement was or was not. In this paper, the adhesiveness of the arbitration clause in the U.S., which is a unique characteristic for consumer arbitration, is investigated as a legal defense to invalidate the consumer arbitration agreements, and its contractuality and related legal doctrines are analyzed.

Ⅱ. Legal Characteristics of the Consumer Arbitration Clause

1. General Characteristics

Arbitration is a process through which a dispute is resolved by arbitrators as agreed on by the parties. The most well-known advantages of arbitration include the speedy resolution of a dispute and the flexibility of the dispute resolution

p.237.

4) Byung-Jun Lee, "The Function and Task of Collective Dispute Mediation in the Framework Act on Consumer", 「Journal of arbitration studies」, v18, n3, 2008, pp. 139-163.; Sun-Joo Jung, "Protection of Consumer in Consumer Arbitration", 「Seoul National University Law Review」, v.49, n.1, The Legal Research Institute of Seoul National University, 2008, pp.231-248; Choong-Lyong Ha, "Contract Defenses in Consumer Arbitration Agreements", Arbitration Review, v.20, n.1. 2010, pp. 151-171.

5) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011.

process. In order to initiate the arbitration process, there must be a written arbitration agreement between the two parties involved in disputes.[6] The arbitration agreement is classified into two types.[7] One is the pre-arbitration agreement, which is a typical agreement for consumer arbitration and should be made before the disputes arise between the parties. The other is the post-arbitration agreement which should be concluded after the disputes arise.

Consumer arbitration is a procedure to settle any dispute between consumers and businesses by the award of arbitrators as agreed on by the parties. When an individual consumer and a business enter into an arbitration agreement through the adoption of an arbitration clause into the contract terms, the consumer may be faced with a lack in bargaining power and legal knowledge in the fulfillment of the contract or may not be aware of the existence and legal effects of the arbitration clause.

Most of the risks to consumers in consumer arbitration originate from the legal characteristic of its adhesion contract.[8] As stated before, a typical consumer arbitration agreement is formed in a way that the agreement is included as an arbitration clause in the main contract between the consumer and the business. In other words, the consumer arbitration clause is a type of pre-dispute arbitration agreement. When the arbitration agreement is formed as a "clause" included in the main contract, such a pre-dispute clause may precipitate the legal damages to individual consumers, which are usually found in the contract of adhesion.

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6) 9 USCA § 2 (A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.); Arbitration Act of Korea Art.8 cl.2 (An arbitration agreement shall be in writing.)

7) 9 U.S.C.A. § 2; Arbitration Act of Korea Art.8 cl.1 (An arbitration agreement may be in the form of a separate agreement or in the form of an arbitration clause in a contract.)

8) Black's Law Dictionary (6th.ed, 1990), "Standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract."

2. Adhesiveness of Consumer Arbitration Clause

One of the major elements to lead to a valid contract is that the parties should have genuine intent to enter into the contract. The contract law in the U.S. regulates the formation of a contract to make sure that both parties enter into it from their genuine intents. The contracts that are short of genuine intents may be formed due to negligent and fraudulent misrepresentation, mistake, duress, and undue influence, resulting in voidable contracts.

When an arbitration agreement is included and dumped with a number of clauses in the agreement between businesses and consumers, the consumer arbitration clause may not be recognized by the individual consumers, which may lead to an unintentional agreement. Such consumers have been traditionally protected by the legal doctrine of the contract of adhesion.

Due to the adhesiveness of the consumer arbitration clause, consumers may suffer several legal damages. First, consumers may have to agree with an arbitration clause though they are reluctant to enter into an arbitration agreement with the business. An option to contract out of the arbitration is not available to individual consumers, which is contrary to the philosophy of freedom of contract.

The second damage may occur if individual consumers are not aware of the inclusion of the arbitration clause in the main contract they concluded with the business. The lack of arbitration clause awareness may be caused by several reasons including time to read and complexity of the terms. Consumers' ignorance of the arbitration clause will make the assent for arbitration agreement involuntary, which is a common law defense for the validity of a contract.

The third damage may arise from one of the legal characteristics of arbitration. Among other things, the key legal trait for arbitration is that access to litigation is denied for the merits of disputes between the arbitration parties.[9] Individual

9) 9 USCA § 3. Stay of proceedings where issue there in referable to arbitration: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms

consumers who are not usually trained about arbitration are likely to be surprised by the denial of access to jury trial when legal complaints are brought into courts. Significant controversies have erupted about the legality of a waiver of right to jury trial by arbitration agreement as discussed in the next section.

Ⅲ. Defenses Originating from the Nature of the Consumer Arbitration Clause

1. Defenses from the Consumers

(1) The Voluntary, Knowing, and Intelligent Doctrine

The denial of right to jury trial by arbitration agreement has become one of the main rationales for the cases supporting the doctrine that waivers of constitutional rights must be voluntary, knowing, and intelligent (hereinafter called "VKI Doctrine").[10] As noted previously, once a consumer arbitration agreement is concluded between two parties, any of the two parties cannot take the merits of disputes to courts, which is why the parties should be voluntary, knowing, and intelligent in making the decision to enter into the consumer

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of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. Korea Arbitration Act Article 9 Arbitration Agreement and Substantive Claim before Court: (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, when the respondent raises a plea for the existence of an arbitration agreement, reject the action: Provided, that this shall not apply in case where it finds that the agreement is null and void, inoperative or incapable of being preformed.

10) Broemmer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148 (1992) ("Adhesion contract which had required patient receiving abortion services to arbitrate medical malpractice disputes was unenforceable as falling outside patient's reasonable expectations where there was no conspicuous or explicit waiver of fundamental right to jury trial or any evidence that such rights were knowingly, voluntarily, and intelligently waived, clinic failed to explain to patient that agreement required all potential disputes to be heard only by arbitrator who was a licensed obstetrician/gynecologist, and patient was under a great deal of emotional stress, had only high school education, and was not experienced in commercial matters."); Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont., 2002) (holding that "that: 1) arbitration clauses were contracts of adhesion; 2) broker owed fiduciary duty to investor to explain the consequences of arbitration clauses; 3) the State constitutional right of access to the courts is a fundamental right; and 4) investor did not knowingly and intelligently waive her fundamental constitutional rights to jury trial and to access to courts.")

arbitration agreement.

Due to the US constitutional guarantee of the right of jury trial in criminal and civil cases,[11] the waiver issue has been frequently reviewed in the criminal and civil courts,[12] while the courts have applied stricter standards to criminal cases than civil cases. In line with the courts' attitudes, the procedural rules for right to jury trial are stipulated differently between the Federal Rule of Criminal Procedure[13] and Federal Rules of Civil Procedure.[14] The basic difference between the two procedural rules is that the former rule takes it granted that the right to jury trial is given to the defendant even without demand, but the latter requires the party to demand jury trial to exercise constitutional right.

The VKI doctrine in the consumer arbitration agreement has its foundations from the conditions required for waiver of the right to jury trial in criminal litigation. In order for the waiver of jury trial to be effective, the federal rule requires three conditions to be met: 1) the defendant waives a jury trial in writing 2) the government consents 3) the court approves.[15]Although any of the conditions are not directly matched with the VKI doctrine, the conditions lead a federal circuit court to deliver fine-tuned standards for the waiver of the right to jury trial.

In U.S. v. Duarte-Higareda,[16] the court provided the principle of voluntary, knowing, and intelligent intent for the defendant to validly waive the right to jury trial, which made sure the parties' real intent to discard their constitutional

11) U.S.C.A. Const. Amend. VI; U.S.C.A. Const. Amend. VII

12) Patton v. U.S, 281 U.S. 276 (1930); U.S. v. Cochran, 770 F.2d 850, (Cal. 9th circuit, 1985); United States v. Christensen, 18 F.3d 822, 826 (9th Cir.1994).

13) Federal Rules of Criminal Procedure, Rule 23 a. "If the defendant is entitled to a jury trial, the trial must be by jury unless: 1) the defendant waives a jury trial in writing; 2) the government consents; and 3) the court approves.3)

14) Federal Rules of Civil Procedure Rule 38 (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:1) serving the other parties with a written demand--which may be included in a pleading--no later than 14 days after the last pleading directed to the issue is served; and 2) filing the demand in accordance with Rule 5(d); (d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.4)

15) Federal Rules of Criminal Procedure, Rule 23 a.

16) U.S. v. Duarte-Higareda, 113 F.3d 1000, (Cal. 1997)(stating "Right to jury trial may only be waived if following conditions are met: waiver is in writing; government consents; court accepts waiver; and waiver is made voluntarily, knowingly, and intelligently.")

rights. It is noticeable that the California circuit court added the VKI Doctrine to the requirement of writing for waiver of right to jury trial, which is stipulated in the Federal Rule of Criminal Procedure Rule 23 a. It is unquestionable that the purpose of such addition is to actively protect the defendant.

(2) Contract of Adhesion as a Contract Defense

In the U.S., the legal purpose of contract of adhesion was founded on the prevention of unfair contract that was standardized, non-negotiated, and pre-drafted by the business. Even though the courts had relied on the object theory of contracts in interpreting the intent of the parties, they had been somehow negative to the legal effects of adhesion contracts, because the individual consumers may be put into an inequitable position by being forced to choose clauses included in the standardized contracts.

In Henningsen v. Bloomfield Motors, Inc. the court stated that due to the advent of standardized mass contract by enterprises with strong bargaining power and position, "the weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."[17]

In order to utilize the principle of adhesion contract as a contract defense there are two steps to be taken for the analysis of its applicability: that the contract itself is an adhesion contract and that the contract (or the clause complained of) either ⅰ) violates the reasonable expectations of the weaker party or ⅱ) is unconscionable.[18] The two tier test was applied in several cases arguing for the validity of arbitration clauses. In Zigrang v. U.S. Bancorp Piper Jaffray, Inc., the defendant appealed to the Supreme Court of Montana when the motion to compel arbitration was denied, asserting that there existed a valid

17) 32 N.J. 358, 389 (1960) (delivering a decision that "manufacturer's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom was so inimical to public good as to compel an adjudication of its invalidity").

18) Robert S. Summers & Robert A. Hillman, *Contract and Related Obligation: Theory, Doctrine, and Practice,* West Group, pp.615-627, 2001,; Bixler v. Next Financial Group, Inc., 2012 WL 877109, p9, D.Mont., 2012.

arbitration agreement. The Supreme Court of Montana in the case stated that "contracts of adhesion arise when a party possessing superior bargaining power presents a standardized form of agreement to a party whose choice remains either to accept or reject the contract without the opportunity to negotiate its terms."[19]

In addition to the materialization of the first requirement, in Iwen v. U.S. West Direct, the Montana court clarified the second prong of the requirement by noting that "doctrine of adhesion itself does not constitute a sufficient basis for invalidating a contract...."[20] instead, a contract of adhesion becomes unenforceable against the weaker party "if it is 1) not within their reasonable expectations or 2) within their reasonable expectations, but, when considered in its context, proves unduly oppressive, unconscionable, or against public policy."[21]

The first prong of adhesiveness of a contract seems to be relatively easy to be proven because it is physically and objectively confirmable whether a weaker party in the contract negotiation is provided a standardized form on a "take it or leave" basis. On the other hand, it does not seem to be simple to prove the second prong of reasonableness or unconscionability due to case-specific volatility. In Brown ex rel. Brown v. Genesis Healthcare Corp. the West Virginia Supreme Court stated that the adhesive arbitration clause required as a prerequisite to agreement "unconscionableness" and that the waiver of right to civil suit caused by the arbitration agreement be "beyond reasonable expectation."[22]

However, such recognition of unconscionablity of an adhesive arbitration clause as shown in the Brown case would not be found in the recent AT&T Mobility LLC case.[23] In AT&T Mobility LLC v. Concepcion, a group of consumers brought putative class action against AT&T, while the defendant moved to compel the consumer arbitration. The district and circuit courts of

19) Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 329 Mont. 239 (2005).
20) Iwen v. U.S. West Direct, a Div. of U.S. West Marketing Resources Group, Inc., 293 Mont. 512, 520 (1999).
21) Id. at 243.
22) Brown ex rel. Brown v. Genesis Healthcare Corp., 2011 WL 2611327 (W.Va.,2011).
23) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011.

California denied the defendant's motion noting that the consumer arbitration clause excluding class action was unconscionable, relying on the case brought up between Discover Bank v. Superior Court.[24)]

In Discover Bank v. Superior Court, the Supreme Court of California stated that "Waiver of class arbitration in a consumer contract of adhesion is unconscionable under California law and should not be enforced, when it occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud or willful injury to the person or property of another."[25)]

However, the U.S. Supreme Court reversed the lower federal courts' decision and rejected the unconscionability of waiver of class action by mobile phone customers against AT&T Mobility LLC, promoting the genuine purpose of the Federal Arbitration Act. It is notable that the Supreme Court's decision favoring AT&T was delivered on the theory that the lower federal courts' application of the California Law was not rooted on the contractual discussion, rather regulating the arbitration practices to protect consumer interests.

The adhesiveness of pre-dispute arbitration clause in any form is getting more difficult to be recognized as "unconscionable" or "beyond reasonable expectation" because the U.S. courts have been active to promote the purpose of Federal Arbitration Act at the cost of protection of individual consumers.[26)]

In order for an arbitration clause to be invalidated due to the adhesiveness, it

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24) Discover Bank v. Superior Court, 36 Cal.4th 148, (Cal.,2005).

25) id.

26) Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stating "a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.); Fouts v. Milgard Mfg., Inc., N.D.Cal., 2012 (stating "Plaintiff does not contend that he was unable to read the Agreement before signing it, or that he could not understand its terms. Although the plaintiff did have to sign the contract as a condition of employment, this does not render the contract unconscionable. Accordingly, there is no evidence of procedural unconscionability in the execution of the Agreement.").

should be found unconscionable for the arbitration agreement to be enforced. In Mayers v. Volt Management Corp., the California court identified two sources of law for contract to clarify the unconscionability prong, common law, and Uniform Commercial Code.[27] In Mayers, the court provided the common law-based clarification for the unconscionablity requirement that a) the contract term was outside the reasonable expectations of the weaker party or b) was unduly oppressive or unconscionable."[28]

The UCC-based concept of unconscionability materialized from two different angles including procedural and substantive elements.[29] In A & M Produce Co. v. FMC Corp., the California court provided a specified description of the "procedural angle" of unconsionability where "unconscionability focuses on oppression, which results from an inequality of bargaining power, and surprise and which involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix form drafted by the party seeking to enforce the disputed terms," together with the substantive description of the unconscionability that "a contractual term may be substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner."330) id.0)[30] However, the procedural and substantive elements are not required to be met to the same degree, but may be compensated with each other on a sliding scale basis that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa."[31]

The Second Restatement of Contract §211 prescribes that standardized contract terms should be recognized "as an integrated agreement with respect to the

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27) Mayers v. Volt Management Corp., 203 Cal.App.4th 1194, 1205 (2012)(citing "In California, two separate approaches have developed for determining whether a contract or provision thereof is unconscionable. One, based upon the common law doctrine, ... A separate test, based upon cases applying the Uniform Commercial Code unconscionability provision[,] views unconscionability as having 'procedural' and 'substantive' elements...", Morris v. Redwood Empire Bancorp 128 Cal.App.4th 1305,1317 (2005)).

28) Mayers supra at 1205 (citing Morris v. Redwood Empire Bancorp 128 Cal.App.4th 1305, 1317 (2005)).

29) A & M Produce Co. v. FMC Corp., 135 Cal.App.3d 473 (1982).

30) *id.*

31) Morris v. Redwood Empire Bancorp 128 Cal.App.4th 1305, 1317 (2005).

terms included in the writing" irrespective of whether the individual party is specifically aware of the terms of agreement or not.[32] In addition to the general acceptability of the adhesion contract, Section 211 also recognizes the exclusion of disputed terms as an exception in case where "the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term."[33] This exception is likely to give a significant defensive platform to the weaker party if the weaker party is successful in proving that the other party was informed of the unwillingness of the assenting party to keep a particular term in the adhesion contract.

2. Defenses from the Businesses

1) The Doctrine of Separability

The issue of contract of adhesion is further complicated with consideration of the separability doctrine of the arbitration clause. The doctrine of separability is a legal principle that the legal effect of an arbitration clause should not be affected by the underlying contract in which the arbitration clause is embedded if an independent challenge is not made against the arbitration clause itself.[34]

However, the applicability of the separability doctrine is contingent upon the types of reasons of the invalidation of an underlying contract. If the reasons of invalidation are based on the existence of arbitration agreement, not just avoidance or rescission, then the separability doctrine may not be applied to sever the arbitration clause from the underlying contract.[35]

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32) REST 2d CONTR §211: "(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing. (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."

33) id.

34) Tanya J. Monestier, "Nothing Comes of Nothing ...", American Review of International Arbitration, Vol.12, 2001, p.223.

In relation with the applicability of the separability doctrine, it seems that the courts' attitudes are split among several cases. For example, in Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., the court commented that the separability doctrine applies to only voidable contract "where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract."[36] This court further stated that a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate."

However, in Standard Coffee Service Co. v. Babin, the court found there was no evidence that the consent from the defendant was made voluntarily; rather, he was forced into singing the employment contract in which an arbitration clause was embedded, applying duress to the underlying contract for the invalidation of the arbitration agreement.[37] In this case, the court denied to adopt the separability doctrine to save the arbitration agreement because the underlying contract was made under duress which made the contract voidable. In Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc. the court accepted the separability doctrine for the contract that was voidable by reason of duress.

The legal characteristic of the contract of adhesion for consumer arbitration clause is contrary to the legal nature of the separability doctrine. The basic legal trait of the contract of adhesion is that the arbitration clause should be taken as a part of the underlying contract with the same legal effect in the other clauses, while the separability doctrine pursues a different legal effect of the severance from the underlying contract. In other words, if the consumer arbitration clause is viewed from the side of the adhesion contract, it should share its vitality with other terms in the underlying contract, which is not the case for the separability doctrine.

It may be ironic that the federal court's attitudes seem to be ignorant of such

35) Choong Lyong Ha, "A Study on the Doctrine of Separability-Focused on the U.S. Federal Arbitration Act and Cases-", International Commerce Review, Vol. 21, 2005, p168.
36) Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1140 C.A.9 (Cal.),1991.
37) Standard Coffee Service Co. v. Babin, 472 So. 2d at 124, 127 (1985).

contradictory logicality between the adhesiveness of consumer arbitration clause and the separability doctrine. In AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court indirectly agreed that the consumer arbitration agreement is created in the form of an adhesion contract by stating that "The Federal Arbitration Act (FAA) preempts California's judicial rule stating that a class arbitration waiver is unconscionable under California law if it is found in a consumer contract of adhesion ... because that rule stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, which include ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. "[38]

On the other hand, in Buckeye Check Cashing, Inc. v. Cardegna, the U.S. Supreme Court reconfirmed the separability doctrine by stating that "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract, and such law applies in either state or federal courts."[39] Both of the cases have in common that the parties made pre-dispute arbitration agreement. However, the U.S. Supreme Court did not draw the line between the legal trait of contract of adhesion and the separability doctrine.

2) Contractuality

In some respects, litigation has been recognized as a more equitable way to resolve disputes between consumers and businesses than consumer arbitration due to individual consumers' lack of experience in arbitration procedure. As a result many individual consumers have tried to vacate the arbitration clause in the contract to take the dispute to court, using a variety of contract and non-contract defenses available to the underlying and arbitration agreements.[40]

38) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011.

39) Buckeye Check Cashing, Inc. v. Cardegna, 126 S.Ct. 1204, 2006.

40) Kloss v. Edward D. Jones & Co. 310 Mont. 123 (2002) ("Investor brought action against securities brokerage firm and its securities broker, alleging violations of state securities statutes, negligence, unfair and deceptive business practices, breach of fiduciary obligations, and fraud" and the Supreme Court of Montana delivered the conclusion that "(1) arbitration clauses were contracts of adhesion; (2) broker owed fiduciary duty to investor to explain

The U.S. Supreme Court's attitudes toward the defenses to vacate arbitration clauses have consistently shown that such defenses should not be based on arbitration-specific regulation or state policies but on contract laws, which is called in this paper as "contractuality" of the defenses.[41] In Doctor's Associates, Inc. v. Casarotto, the Supreme Court held that "FAA preempted the Montana statute which conditioned the enforceability of the arbitration clause in compliance with special notice requirements"[42] that were provided by the Montana Arbitration Law.[43]In this case, the Supreme Court stated that the Montana arbitration requirement was not applicable to contracts generally; but was to only arbitrate contracts, thereby being preempted by the FAA.[44]

In Harris v. Green Tree Financial Corp., the Third Circuit Court stated that "the generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act" reversing the District's decision to deny the defendant's motion to compel arbitration.[45] Another case supporting the "contractuality" of defense to arbitration agreement is found in Fosler v. Midwest Care Center II, Inc. In this case, the Illinois Appellate Court held that the "Provisions of Nursing Home Care Act invalidating any waiver by anursing home resident of the right to bring a lawsuit under the Act or the right to jury trial were preempted by Federal Arbitration Act (FAA), and thus a nursing home resident whose admission agreement contained

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the consequences of arbitration clauses".); Foss v. Circuit City Stores, Inc., 477 F.Supp.2d 230, 2007 (Due to infancy, "the Court finds that without written ratification, the Agreement never came into existence between Foss and Circuit City.FN4 33 M.R.S.A. §52. Therefore, there is no agreement to arbitrate the dispute, and the Motions to Compel Arbitration and Stay the Proceedings are DENIED."); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 2011 (the Court stated that the assertion made by Concepcion was not based on the contract defense, thus the California court's decision to vacate the arbitration clause was groundless).

41) Contractuality of the defenses to arbitration agreement refers to whether or not the defenses to vacate the arbitration agreement reflect the common law based contract laws; if it does, the defense is contractual, otherwise it is not.

42) Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 1996.

43) The requirement for arbitration clause in Montana's law was that "notice that the contract is subject to arbitration" should be "typed in underlined capital letters on the first page of the contract." Mont.Code Ann. § 27-5-114(4) (1995).

44) Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 1996.

45) Harris v. Green Tree Financial Corp., 183 F.3d 173, C.A.3 (Pa.),1999.

arbitration provision was obligated to arbitrate her Nursing Home Care Act claims against the nursing home," and delivered an opinion that the Act should not give a more favorable right to nursing residents than the contract laws generally provide them.[46]

Recently, in AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court has reaffirmed that generally applicable contract defenses such as duress, fraud, and unconscionability were the only legal bases for invalidating arbitration agreements, negating the viability of the defenses specially targeted to arbitration agreements.[47] It seems clear that the U.S courts have been consistent in maintaining the minimum guideline that the defense to invalidate arbitration agreements should not be found from the regulatory measures on consumer arbitration but in the legal frame of contract law. It is well-known that such trends in the cases in consumer arbitration were motivated by the Federal Arbitration Act to promote the arbitration system.[48]

Ⅳ. Conclusion

In this paper the legal issues of consumer arbitration have been analyzed in several legal perspectives including the voluntary, knowing, and intelligent doctrine, doctrine of separation, contract of adhesion, and contractuality of defenses. Among all of these, the first three issues are related with the arbitration clause, and the last one, the contractuality of defenses, reflects the nature of defenses invalidating the consumer arbitration agreement.

The VKI doctrine and contract of adhesion principle have some common factors in their legal nature. Firstthe validity of consumer arbitration clause is checked with that of other clauses in the principal contract. Second, the visibility

46) Fosler v. Midwest Care Center II, Inc., 398 Ill.App.3d 563, 2009.

47) AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011) (stating "arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

48) 9 U.S.C.A. §2.

of arbitration clause has been an important factor in considering the validity of the arbitration clause. Third, it is an important issue whether the consumer has an equal degree of intent to agree with the arbitration clause compared with other clauses in the contract.

In recent years not only the VKI doctrine but adhesion contract has been losing its viability in the litigation to invalidate consumer arbitration agreements arguably due to the federal courts' inclination to promote consumer arbitration. The federal courts began to apply stricter standards to activate the doctrine of adhesion contract including procedural and substantive conscionability to complete pleadings by adhesion contract.

The doctrine of separability aims to segregate the legal effect of arbitration clause from that of the principal contract. It may be said that the separability doctrine pushes forward the arbitration clause to survive in the disputes of its validity because the grounds for nullity of the principal contract cannot be spilled over to the arbitration clause. The U.S. courts' support for the doctrine reflects the future diffusion of consumer arbitration.

However, the doctrine of separability seems to be conflicting with the Supreme Court's contractuality doctrine for the invalidation of the consumer arbitration clause. The contractuality doctrine means that defenses for the invalidation of arbitration agreements should not be based on the state government's regulation targeted to arbitration, but wholly on contractual defenses. The contractuality doctrine implies that the validity of arbitration agreement should be litigated within the scope of contract law not controlled by the government. The doctrine of separability may be a case the Supreme Court itself fell into a regulative support targeted to arbitration, which is a contradiction between the separability doctrine and the contractuality doctrine.

It seems that the legal discussions of consumer arbitration are not mature enough to even further analyze the consumer protection issues in Korea. It is only up to the business parties whether they enter into an arbitration contact. Therefore, it is not necessary to build a separate law to establish consumer arbitration, yet it is necessary to capture a measure to protect a weak party in the arbitration agreement in the context of a contract law system in Korea.

The U.S. Supreme Court delivered a decision on the case between AT&T and Concepcion, which confirmed the contractuality of a defense as a threshold to distinguish between what is a viable defense for the invalidation of a consumer arbitration agreement and what is not. In this paper, the adhesiveness of arbitration clause, which is a unique characteristic for consumer arbitration, is investigated in the U.S. as a legal defense to invalidate the consumer arbitration agreements, and its contractuality and related legal doctrines are analyzed. The legal issues of consumer arbitration have been analyzed in several legal perspectives including the voluntary, knowing, and intelligent doctrine, doctrine of separation, contract of adhesion and contractuality of defenses. Among all of these, the first three issues are related with the arbitration clause, and the last one, the contractuality of defenses, reflects the nature of defenses invalidating the consumer arbitration agreement.

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