ARBITRATION CLAUSE AS UNFAIR CONTRACT TERM: SOME OBSERVATIONS ON THE ECJ´S CLARO CASE

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Abstrakt

Předmětem tohoto příspěvku je rozhodčí doložka jako nekalé smluvního ujednání ve smyslu směrnice 93/13/EEC o nekalých ujednáních ve spotřebitelských smlouvách. Touto problematikou se zabýval Soudní dvůr Evropských společenství v nedávném rozhodnutí *Claro v Móvil*. Soudní dvůr v této věci rozhodl, že rozhodčí nález může být zrušen soudem členského státu, pokud bylo rozhodčí řízení založeno na rozhodčí doložce, která byla nekalým smluvním ujednáním ve smyslu výše uvedené směrnice. Důvodem pro zrušení rozhodčího nálezu je podle Soudního dvora rozpor s tzv. Evropským veřejným pořádkem, jehož součástí je i ochrana spotřebitele před nekalými smluvními ujednáními.

Navzdory rozdílným názorům na rozhodnutím *Claro* je vzkaz Soudního dvora jasný. Rozhodčí řízení je určeno pro obchodníky. Spotřebitelé mají vést své spory v rámci alternativních způsobů jejich řešení nebo před obecnými soudy.

Příspěvek nabízí několik úvah nad potenciálním dopadem rozhodnutí *Claro* na český právní řád zejména s ohledem na zákon o rozhodčím řízení a občanský zákoník.

Klíčová slova

Spotřebitel – rozhodčí řízení – rozhodčí nález – nekalé smluvní ujednání – rozhodčí doložka – případ Claro – Směrnice o nekalých smluvních ujednáních – ochrana spotřebitele - Evropský veřejný pořádek – uznání a výkon – nevznesení námitky nekalosti rozhodčí doložky během rozhodčího řízení

Abstract

This paper address the problem of the annulment of an arbitration award by national courts on the grounds that the arbitration proceedings were based on arbitration clause as an unfair contract term under the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The ECJ decided in the case *Claro v Móvil* that arbitration award may be annulled by national court if it is based on arbitration clause which turns out to be unfair contract term. Moreover, according to the ECJ, consumer has no duty to object unfairness of the arbitration clause in

the course of arbitration proceedings. Therefore, the national court may find the term unfair thus void on its own motion. The reasoning behind this was that the arbitration award was at odds with mandatory provisions of the Directive on unfair terms in consumer contracts, which form part, in the view of the ECJ, of the so called European public policy.

Notwithstanding the different opinions on this case, the message from the ECJ is clear. The arbitration is a mean of settlement of disputes which is intended for the B2B disputes. On the contrary, the B2C disputes should be resolved in Alternative Disputes Resolution or before ordinary national courts.

Consequently, I would like to offer some ideas on the potential impact of the *Claro* decision upon Czech legal order. Thus, particularly the existing legal frame for consumer disputes created by the Czech Arbitration Act and Civil Code is analysed.

Key words

Consumer – Arbitration – Arbitral award- Unfair contract term – Arbitration clause – the Claro case – Directive on Unfair Contract Terms – protection of consumers - European public policy- Recognition and enforcement- Failure to raise the unfairness of a term in the course of arbitration proceedings

1.Setting the scene

In the recent decision of the European Court of Justice (hereinafter "ECJ") in the case *Claro v Móvil*[1] has arisen a grave conflict between arbitration law and consumer contract law. This decision is important because it enables the national courts to annul arbitration award if the arbitration proceedings were based on arbitration clause which proved to be unfair contract term under the Directive 93/13/EEC on unfair terms in consumer contracts, even though the unfairness thus invalidity of the arbitration clause was not objected in the course of arbitration proceedings.

I would like to analyse in this paper the Claro case from two viewpoints. Firstly, I am concerned with the possible influence of this decision on both national and international arbitration.Second, I offer some thought on the implications of the Claro case for the Czech law.

[1] Case C-168/05 *Elisa Maria Mostaza Claro* v *Centro Movil Milenium SL* [2006] ECR I-10421.

My personal belief is that the decision in the Claro could open an avenue to protect consumers again the daily practice of some of the businessmen, who (ab)use the arbitration clauses included in their standard business terms, to remove the consumer from his "natural judge". This is of importance in the Czech Republic where, contrary to the majority of the EU Member States, has not been so far introduced sufficient and adequate legislation dealing with the mechanism of solving consumer disputes.

2. Legal basis for unfair contract terms

The legal basis for unfair contract terms is created by Council Directive 93/13/EEC on unfair terms in consumer contracts (hereinafter "Directive").[2] The Directive states as one of its aims that "*acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.*"[3]

For our purposes, the key provision of the Directive are the articles 3(1), 6(1) and 7(1) of the Directive. Article 3(1) of the Directive contains general clause which serves for assessment of unfairness of contract terms. This provision reads as follows: *"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."*[4] Article 6(1) of the Directive sets forth that *"Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."* This rule is of mandatory nature and it is intended for Member States in order to ensure that the consumers will not be bound by unfair terms in contract with businessmen. The method which should be used to achieve this aim has been left to Member States. Last but not least, the article 7(1) of the Directive stipulates that *"Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair*

[2] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, p. 0029-0034.
[3] Cf the Preamble to the Directive.
[4] Art. 3 of the Directive.

terms in contracts concluded with consumers by sellers or suppliers." It entails both protection by means of both public and private law. In the sphere of private law, the effective legislative reaction by Member States to prevent continuation of using the unfair contract terms by businessmen is expected.[5]

The Directive contains in its Annex an indicative and non-exhaustive list of unfair contract terms. Thus, Member States have had a choice which of these terms, if any, will introduce into their national legal orders. It bears noting that the list contains *inter alia* that as unfair contract term may be considered *"excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes* ***exclusively to arbitration*** [emphasis added by Z.N.] *not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."* Therefore, the European legislator was perfectly aware of the fact that arbitration clause may be unfair term *par excellence*.[6] And it was an arbitration clause as unfair contract term which was at the heart of the dispute in the Claro case.

3. The Claro case

The case concerned a mobile telephone contract concluded between *Móvil and Ms Mostaza Claro*.[7] The contract included an arbitration clause, under which any disputes arising from the contract were to be referred for arbitration to the *Asociación Europea de Arbitraje de Derecho y Equidad* (European Association of Arbitration in Law and in Equity, hereinafter "*AEADE*").

Ms *Claro* did not comply with the minimum subscription period, therefore *Móvil* initiated arbitration proceedings before the AEADE. The *Móvil* granted Ms *Claro* a period of 10 days in which to refuse arbitration proceedings, stating that, in the event of refusal, she could bring legal proceedings. Ms *Claro* presented arguments on the merits of the dispute, but did not repudiate the arbitration proceedings or claim that the arbitration agreement was void. The arbitration proceedings subsequently took place and the arbitrator found against her.

[5] Cf the Preamble of the Directive.
[6] At this occasion, it is worth mentioning that Czech legislator has not taken over the arbitration clause from the Annex into the list of unfair terms which is contained in the article 56(3) of the Czech Civil Code. On the other hand, the catalogue of unfair contract terms is only demonstrative thus enabling the courts to find contractual term unfair even though not mentioned in the 56(3) of the Czech Civil Code.
[7] Case C-168/05 *Elisa Maria Mostaza Claro* v *Centro Movil Milenium SL* [2006] ECR I-10421.

Consequently, Ms Claro contested the arbitration decision delivered by the AEADE before the *Audiencia Provincial de Madrid* (Provincial Court de Madrid), submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void. The *Audiencia Provincial de Madrid* found that the arbitration agreement is an unfair contractual term and is therefore void.

However, since Ms *Claro* did not plead that the arbitration agreement was void in the context of the arbitration proceedings, and in order to interpret the national law in accordance with the Directive, the *Audiencia Provincial de Madrid* decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
"May the protection of consumers under Council Directive 93/13/EEC … require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?"[8]

The ECJ answered that "*Directive must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, ev*en *though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.*"[9]

4. The Grounds for the ECJ´s decision

[8] The Claro case, para 20.
[9] The Claro case, para 40.

The *Claro* decision follows the line of the ECJ´s cases in *Océano, Freiburger Kommunalbauten* and *Cofidis*.[10] Generally speaking, these decision answered to the question whether the national court may on its own motion find the contractual term unfair. The ECJ´s answer was in affirmative. However, it should be borne in mind that the ECJ cannot, generally taken, asses unfairness of a concrete contract term. This is the task for national court.[11]

The ECJ´s reasoning in the *Claro* case was based on the nature of the system of protection introduced by the Directive. The ECJ emphasised that *"the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge"* and *"such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract."*[12]

Furthermore, the ECJ held that *"the national court's power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers."*[13] Such power of national court is necessary in order to ensure real and effective protection of consumers, for the consumer is not able to foresee possible legal consequences of arbitration clause as unfair contract term. The purpose of the Directive cannot be achieved if the court seized of an action for annulment of an arbitration award is unable to determine whether that award was void only due to the fact that the consumer did not plead the invalidity of the arbitration clause in the course of the arbitration proceeding.[14]

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[10] Joined Cases C-240/98 to C-244/98 *Océano GrupoEditorial and Salvat Editores* [2000] ECR I-4941.; Case C-473/00 *Cofidis v Jean-Louis Fredout* [2002] ECR I-10875.; Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger and Ulrike Hofstetter* [2004] ECR I-3403 Cf also Liebscher, Ch. *Case C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL, judgment of the Court of Justice (First Chamber) of 26 October 2006 ECR I-10421*, CMLR, 2008, 45, p. 549.

[11] Cf Research Group on the Existing EC Contract Law (Acquis Group). *Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*. München: Sellier. European Law Publishers, 2007, p. 244.; Nebbia, P. *Unfair Contract Terms in European Law. A Study in Comparative and EC Law*. Oxford-Portland Oregon: Hart, 2007, 169. Both these books refer to the mentioned decision *Freiburger Kommunalbauten.*

[12] The Claro case, para 25.

[13] The Claro case, para 27.

[14] The Claro case, para 30.

Moreover, the ECJ found that *"the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory."*[15] Therefore, the ECJ considers the protection provided by the Directive as a part of economic European Public Policy, because the protection of consumers is essential for the functioning of internal market. This reasoning is analogous to that employed in the famous *Eco Swiss* judgement where the article 81 of the EC Treaty was found to be part of European Public Policy.[16] However these grounds may seem reasonable, some doubts remain. How could one identify the rules of Community Law which are of mandatory nature? It seems that it is somewhat unpredictable whether the concrete rule of Community Law is of Public Policy nature or not.

It is worth mentioning that the opinion of Advocate General *Tizzano* in this case was slightly different from that of the ECJ.[17] Advocate General took the similar position as the ECJ so far that the problem in the Claro case is based on public policy considerations. Yet, unlike the ECJ, in the opinion of Mr. *Tizzano* the right to a fair hearing as one of the fundamental rights derived from constitutional traditions common to the Member State was breached.[18] Therefore, whilst the ECJ based its decision on wide understanding of European public policy as economic public policy, Advocate General suggested the narrower application of European public policy, limited *"only to rules that are regarded as being of primary and absolute importance in a legal order"*[19]. Thus, Mr. *Tizzano* put emphasis on fundamental human rights and freedoms as meta-economic public policy.[20] Consequently, the breach of these fundamental rights is the sufficient reason to annul arbitration award.

6. The Claro decision and arbitration law

[15] The Claro case, para 37.
[16] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.
[17] Opinion of the *Advocate General Tizzano* in the Claro case, para 57-61.
[18] Opinion, para 59.; cf case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935, para 38.; cf also Nález Ústavního soudu ČR ze dne 25. 4. 2006, sp. zn. I. ÚS 709/05 (The decision of the Constitutional Court of the Czech Republic no. I ÚS 709/05)
[19] Opinion, para 56. Cf Pauknerová, M. *Evropské mezinárodní právo soukromé*. 1. vydání. Praha: C. H. Beck, 2008, p. 163.
[20] For more profound analysis of the fundamentals rights as public policy cf Hammje, P.: *Droits fondamentaux et ordre public*, Revue Critique de droit international privé, 1997, 86, 1, p. 2 *et seq*.; For understanding of public policy as derived from constitutional values cf Novelli, G.: *Compendio di Diritto Internazionale privato e processuale*. Napoli: Esselibri, 2007, p. 59.

One of the main advantages of arbitration as an alternative mean of settling the disputes lies in the limited grounds of review of arbitration awards by national courts.[21] Therefore, the arbitration award should be smoothly recognised and enforced. Among the possible defences to arbitration award both in international and national arbitration are absence of a valid arbitration agreement and violation of public policy of the country where the enforcement is sought.[22] These two defences were also raised in the *Claro* case. Nonetheless, the *Claro* case was purely of domestic nature.[23] Thus, one may ask if the reasoning of the ECJ would be also employed in the international arbitration. In the light of the *Claro* case, it seems that this question should be answered in affirmative, because the mandatory nature of the Directive as the part of European public policy will override the foreign arbitration award. Albeit, there must be a sufficient connection with the territory of the EU in order to apply the EU consumer protection rules as public policy exception.[24]

However, the *Claro* decision has caused worries to persons involved in international arbitration owing to the wide and relaxed scope of European public policy (in comparison with the ECJ´s previous decision in *Eco Swiss*[25]) adopted by the ECJ, causing uncertainty as for the rules of Community law which form part of it. Moreover, the *Claro* decision opened yet not fully resolved issue of the rather problematic relationship between arbitration law and European Law. The difficulties in this relationship arise, *inter alia*, from the fact that arbitrator are expected to apply Community law as on the merit of a dispute[26], but on the other hand they are not allowed to ask the ECJ to interpret European Law in preliminary ruling.[27]

7. The impact of the Claro decision on Czech legal order

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[21] Landlot, P. *Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements*, Arbitration International, 2007, vol. 23, no. 1, pp. 65-66.

[22] Graf, B.U.-Appelton, A. E. *Elisa María Mostaza Claro v Centro Móvil Milenium: EU Consumer Law as a Defence against Arbitral Awards, ECJ Case C-168/05,* ASA Bulletin, 2007, 1, p. 48.; cf also Rozehnalová, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku. 2., aktualizované a rozšířené vydání.* Praha: ASPi, Wolters Kluwer, 2008, p. 333.

[23] It was the Spanish case.

[24] Graf, B.U.-Appelton, A. *op. cit.* sub 22, p. 60.; Landlot, P. *op. cit.* sub 21, p. 82.; I see this sufficient connection particularly in the fact that arbitration award was issued by the arbitrator with his seat in Member State against the consumer domiciled in another Member State. However, in my view, the public policy exception based on consumer protection could be raised even though the arbitration award was issued in a non-member state against consumer domiciled in Member State.

[25] Cf Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 35.

[26] Of course, there may be some exceptions, for instance, when arbitrators are entitled by parties to decide the case *ex aequo et bono*. Cf also Lew, J. D. M.- Mistelis, L. A.- Kröll, S. M. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, p. 476.

[27] Cf Case 102/81 *Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei und Reederei Friedrich Busse Hochseefischerei Nordstern* [1982] ECR 1095.

In this part of my paper I offer some ideas on the compatibility of the Claro decision and some rules of Czech legal order. Particularly, I aim to elucidate that both the Arbitration Act[28] and the Civil Code[29] of these laws are at odds with the Directive as well as the line of the cases from the *Océano* to the *Claro*. My impression is that namely article 33 of the Czech Arbitration Act and the art. 55(2) of the Czech Civil Code are in strong contrast to the protection provided by the Directive.

First, the Arbitration Act lays down in its article 31 the exhaustive list of reasons, for which the arbitration award may be annulled. The article 31 b) sets forth that court on the motion of the party of an arbitration proceedings shall annul arbitration award if the arbitration clause is invalid. So far so good. However, this article should be read together with article 33 of the Arbitration Act which determines that court shall refuse the claim which seeks to annul arbitration award based upon nullity of arbitration clause, if the party seeking for annulment of arbitration award, did not object the invalidity of arbitration clause in the course of arbitration proceedings, although she was able to do so. In the light of the ECJ decision in the *Claro* case, the national court shall asses the unfairness of the contract term thus arbitration clause on its own motion. Therefore, the article 33 of the Arbitration Act having stipulated that party has to object the unfairness thus invalidity of arbitration clause only in the course of arbitration proceedings and nevermore is clearly contradictory to the *Claro* decision. It appears that the article 33 of the Arbitration Act impedes the Directive to fulfil the aim stipulated in its art. 6(1) that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. Thus, it seems to me that the Directive was not implemented into Czech law properly.[30]

Unfortunately, the improper implementation of the Directive does not *per se* mean that Czech courts are obliged to annul arbitration award if the consumer did not object the invalidity of arbitration clause in the course of arbitration proceedings. However, the Czech consumer against whom the arbitration award was issued may attack this decision before court on the grounds that the arbitration clause was unfair thus invalid. Consequently, the supplier or seller would object that the consumer did not plead the invalidity of the arbitration clause in the

[28] Zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálezů, ve znění pozdějších předpisů.
[29] Zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů.
[30] This is not only main impression. Cf Švestka, J.- Spáčil,J.- Škárová, M. Občanský zákoník. Komentář. Praha: C. H. Beck, 2008, § 55, marginal number 10,

course of arbitration proceedings (under article 33 of the Arbitration Act). Then, the consumer might claim that in accordance with the *ECJ´*s *Claro* decision court seized of an action for annulment of an arbitration award must determine whether the arbitration clause is void and annul that award when it is based on an unfair term, even if the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but solely in that of the action for annulment.

Although the Czech court has no duty to respect the ECJ´s decision in the *Claro*, it is, at the very least, obliged to interpret the Czech law, therefore article 33 of the Arbitration Act, as far as possible in accordance with Community law[31], therefore the article 6(1) of the Directive and the *Claro* decision giving interpretation of the Directive. The consumer may also ask the court to refer the similar preliminary question to the ECJ as was in the *Claro* case. Then, it is probable that the ECJ would consider the case similarly. In consequence, the national court will be bound by the answer of the ECJ. Yet, it is far from clear how court may give interpretation in conformity with Community law when the article 33 of the Arbitration Act is absolutely contradicted to it.

Finally, if the consumer lose the dispute, he may claim damages caused by the defective implementation of the Directive against the Czech Republic.[32] Albeit, at the end of the day, it will be on Czech law-maker to ensure the conformity of the Arbitration Act with the Directive. As was mentioned, article 33 of the Arbitration appears to be contrary to the aims of the Directive.

In my opinion, however, there is another path, how the Czech consumers may fight against the using of unfair arbitration clauses by businessmen. My impression is, and it was indicated by Advocate General *Tizzano* in his Opinion in *Claro* case, that taking the consumer before a arbitrator due to arbitration clause which turns out to be invalid, thus illegal, amounts to a breach of right to a fair hearing.[33] This right is guaranteed in the Czech Republic by the article 36 of the Bill of Fundamental Rights and Freedoms (hereinafter “Bill of Rights”) which

[31] Cf Craig, P.- De Búrca, G. *European Law. Texts, Cases and Materials*. Oxford: OUP, 2008, p. 295.
[32] Cf *Joined cases C-178//94, C-179/94, C-188/94 and C-190/94 Erich Dillenkofer and others v Bundesrepublik Deutschland* [1996]ECR I-04845. This case dealt with the improper transposition of the Package Travel Directive. However, I must confess I am not fully convinced that the claims for State liability will work easily in practice in the Czech Republic. But it is still one of the solutions how to face the improprely implemented Directive.
[33] The Advocate General Tizzano opinion, para 57.

provides that *"anyone may claim her right before independent and impartial court and in defined situations before the other institutions."*[34] This article should be read together with the article 38 of the Bill of Rights which stipulates that *"anyone may not be removed from her lawful judge. The competence of court and judge is provided by law."* Therefore, I am inclined to say that the bringing of a consumer before arbitrator due to arbitration clause which is invalid, provided that there was the ordinary court otherwise competent, in which the case might have been heard, means that the consumer was deprived of his right of fair hearing and right to lawful judge. This holds true especially in cases of so called arbitration centres or arbitrators *ad hoc*. On the other hand, I would be somewhat reluctant to reach the same conclusion as for the *Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic*.[35] Although I am aware that I have opened can of worms by proposing these argument, I think that they could prove correct in the (perhaps nearly) future.

The content of the Directive was introduced into the Civil Code, which lays down the rules for unfair contract terms in its articles 55 and 56. The article 56(1) of the Directive contains the general clause for assessing of unfairness of the contract term.[36] The same article contains in its third paragraph the non-exhaustive list of unfair terms which may be considered unfair. In addition, it is worth mentioning that said list does not include the arbitration clause.

In my judgement, the most problematic provision in the Civil code concerning unfair contract terms is the article 55(2) of the Civil Code which provides that *"term in consumer contract is considered to be valid thus binding unless the consumer has objected its invalidity."* This conception of so called relative invalidity of unfair contract term has been based on fallacy that consumers are able to consider whether the contract term is advantageous or not.[37] Hence, if the term is favourable to consumer, then he will not claim its invalidity.[38] The good example to illustrate how illusory this conception is might be just an arbitration clause contained in standard business terms, whose far-reaching impact cannot be practically foreseen by consumer. Thus, since consumers have often only limited knowledge about their

[34] Usnesení předsednictva České národní rady č. 2/1993 Sb. ze dne 16. prosince 1992 o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky.
[35] More information available at: http://www.soud.cz/en_index.php?url=en_obsah.htm [visited 18th May 2008]
[36] Its wording is practically identical with that of art. 3(1) of the Directive. Cf chapter 2 of this paper.
[37] Cf Švestka, J.-Spáčil, J. - Škárová, M.-Hulmák, M. *et al*. *Občanský zákoník. Komentář.* Praha: C. H. Beck, 2008, *§55, bod 11*.
[38] *Ibid.*

rights and the consequences of the contractual terms, the article 55(2) of the Civil Code cannot fulfil the requirement of art. 6(1) of the Directive that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. At the same time, the article 55(2) of the Civil Code is contrary to the line of the ECJ´s cases in *Océano, Cofidis* and *Claro,* where the ECJ decided that the court should asses the unfairness thus invalidity of arbitration clause on its own motion.[39]

Last but not least, practically all Member States have reacted in their legislation on arbitration agreements between businessmen and consumers.[40] For instance, French Code Civil excludes the possibility to conclude arbitration clause between consumers and businessmen.[41] The specific regulation contains German law which lays down strict formal requirements for the arbitration agreement. According to the § 1031(5) German Code of Civil Procedure an arbitration agreement "*must be contained in a document signed by the parties themselves*".[42] Some countries, for example Denmark, have chosen rather different was of dealing with consumer arbitration by establishing state complaint boards in which business and consumer associations participate.[43] The Danish law provides that the consumer can at any time take his complaint before the board.[44] The arbitration proceedings shall be staid until the complaint board has decided the case. It seems to be the one of the possible avenues leading to satisfactory regulation of consumer disputes in the Czech Republic.

7. Conclusion

Only recently the *Juzgado de Primera Instancia No 4, Bilbao* (the Court of First Instance, Bilbao, Spain) has referred to the ECJ following preliminary question[45]: *"May the protection of consumers under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts require the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the*

[39] L.c.
[40] Comprehensive overview provides Reich, N. *More clarity after 'Claro'? Arbitration clauses in consumer contracts as an ADR (alternative dispute resolution) mechanism for effective and speedy conflict resolution, or as'deni de justice'?* ERCL, 2007, 1, p. 44
[41] Cf Reich, N., *op. cit.* sub 40, p. 47.(with reference to article 2061 Code Civil)
[42] Reich, N., *op. cit. sub* 40, p. 45.
[43] Reich, N., *op. cit. sub* 40, p. 48.
[44] Article 8(3) of the Danish *"Lov om Forbrugerklagenoevnet"*(cited according to Reich, N., *op. cit.* sub 40)
[45] The reference for a preliminary ruling from Juzgado de Primera Instancia No 4, Bilbao (parties to an original proceedings *Asturcom Telecomunicaciones S.L.*and *Cristina Rodríguez Nogueira*), OJ C 92 , 12 April 2008, p. 17.

arbitration agreement is void and accordingly to annul the award if it finds that that arbitration agreement contains an unfair term to the detriment of the consumer?"

The prognosis of the answer by the ECJ would be that the Member States´ court may on its own motion annul arbitration award provided that the arbitration clause is unfair contract term, therefore void, even if the consumer was absent in the arbitration proceedings. The reason behind this is the message given by the *Claro* decision: the arbitration is a domain of the disputes between businessmen. In consequence, in the B2C dispute preference should be given to the other alternative dispute resolution methods.

The *Claro* case has brought another important point. It has shown that the procedural consequences of the arbitration clauses are far-reaching. Therefore, one may even say that these "procedural unfair terms" are even more dangerous for consumers than, for instance, excessive penalty clauses. Thus, the Czech law-maker should ensure that the using of these arbitration clauses in the consumer contracts shall not continue. In consequence, there must exist an effective mechanism of settling consumer disputes. Notwithstanding the latest efforts of the Ministry of Industry and Trade which tries to employ voluntary mechanism of settling the consumer disputes, it is not for sure that this will lead to desirable consequences.[46] Hence, There should be a mechanism of settling the disputes between consumers and businessmen which is obligatory for both sides so that there is no room for those of businessmen who abuse the arbitration clause in their standard business terms.

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