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# APPLICATION OF THE EU CONSUMER LAW IN THE CZECH REPUBLIC

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## Abstract in original language

Příspěvek nejprve krátce shrne dosavadní judikaturu SD EU ohledně ochrany spotřebitele, zejména rozhodnutí týkající se rozhodčích a prorogačních doložek. Poté bude rozebrána judikatura českých soudů, která se týká těchto otázek. Následně bude zhodnocen postup českých soudů při aplikaci evropského práva. Následovat bude analýza změn, které přinese novela zákona o rozhodčím řízení a nový občanský zákoník.

## Key words in original language

rozhodčí doložka, prorogační doložka, spotřebitelské právo, ochrana spotřebitele, rozhodčí řízení

## Abstract

At the beginning, this contribution will shortly summarize current decisions of the ECJ on consumer protection, in particular decisions dealing with arbitration and prorogation clauses. Next, judicature of the Czech courts connected to the abovementioned issues will be analyzed. This part will be followed by evaluation of the Czech courts´ approach when applying European consumer law. This part will be followed by analysis of changes, which will bring the amendment to the Arbitration Act together with the New Civil Code.

## Key words

arbitration clause; prorogation clause; consumer law; protection of consumer; arbitration proceedings

In the Czech Republic, the issue of protection of consumers is regulated on national level (by national acts) as well as on European level since the Czech Republic is the member of the EU. This article aims to explore interaction between these two levels of regulation, with its focus on arbitration clauses in consumer contracts. Relevant judgment of both European Court of Justice and Czech courts will be discussed as well. An amendment to the Arbitration Act is currently being processed as well as New Civil Code therefore the article should also answer question whether this amendment would improve current situation in the area of arbitration clauses in consumer contracts

## 1. TRANSPOSITION OF DIRECTIVE 93/13/EEC OF 5 APRIL 1993 ON UNFAIR TERMS IN CONSUMER CONTRACTS

In This directive presented a big step forward in the consumer protection on the EU level because it was the first document summarizing minimal requirements in this area of law for the whole EU. It was implemented to the Czech law by Act No. 367/2000 Coll.,

on change of the Civil Code, as amended, and some other laws, which implemented three directives on consumer protection[1]. However, the implementation was not very accurate. - this can be observed on the basis of the mere translation of the term "unfair" - it was translated as "nepřiměřený" which means inappropriate instead of "zneužívající".

There are also differences in the definition of the unfair term itself. Under the directive, the unfair term was defined as:

Not being individually negotiated;

In contradiction to the requirement of good faith;

Causing a significant imbalance in the parties´ rights and obligations;

This imbalance is to the detriment of the consumer.

Under the Civil Code, conditions of unfair term are:

In contradiction to the principle of good faith;

Causes a significant imbalance in the parties´ rights and obligations;

This imbalance is to the detriment of the consumer.

Based on simple comparison between definition from the directive and from the Civil Code, it is obvious that condition of individual negotiation is missing in the Czech law.

The directive includes in Annex 1 a list of examples of unfair terms, which were member states, supposed to transpose to their law as well. This list is by no means exhaustive; it serves only as a demonstrative enumeration. When transposing this list of unfair terms, member states were supposed to do so completely without omitting any terms but they could add more terms if they deemed it necessary. Therefore, this list serves as a basis for determining which term is unfair.

Nevertheless, the Czech Republic chose a somewhat creative approach and transposed only 12 instead of 17 examples of unfair terms. Most importantly, the Czech Republic omitted to transpose letter q) of the Annex, which states that "[terms] 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 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". As a result, there is no explicit

[1] Beside directive 93/13/EEC, directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises and directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts was implemented by this Act.

provision in the Czech law, which would deem terms requiring consumer to use only arbitration not covered by legal provisions (mostly ad hoc arbitration) unfair.

## 2. THE MOST IMPORTANT ECJ'S JUDGMENTS REGARDING DIRECTIVE 93/13/EEC

The first ECJ's judgment regarding above-mentioned directive was Oceano Grupo Editorial (connected cases C-240/98 to C-244/98). This case concerned a group of consumers who bought encyclopaedias. The sales contract contained prorogation clause in favour of a court in the seat of a salesperson where none of the consumer actually lived.

In this judgment, the ECJ stated that the aim of directive would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. Effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

In Mostaza Claro case (C-168/05), arbitration proceedings against consumer, Mrs. Mostaza Claro were conducted. However, Mrs. Mostaza Claro did not raise objection of invalidity of the arbitration clause during the course of arbitration proceedings but it raised such objection only during proceedings before court, which was asked to set the award aside. According to the Spanish court, there were no doubts that the arbitration clause, which served as a basis for these proceedings constituted an unfair term in the sense of directive 93/13/EEC but the problem was that this objection had to be raised during the arbitration proceedings, which Mrs. Mostaza Claro did not fulfil.

In this case, the ECJ de facto approved use of arbitration clauses in consumer contracts if the requirements in direction are satisfied. It also stated that the aim of the directive could not be achieved if the court seized of an action for annulment of an arbitration award was unable to determine whether that award was void solely because the consumer did not plead the invalidity of the arbitration agreement in the course of the arbitration proceedings. Therefore, the court can set the award aside even if the consumer did not raise the objection of invalidity of arbitration clause in the arbitration proceedings but only before court.

In Pannon judgment (C-243/08), consumer, Mrs. Györfi, was sued under the prorogation clause, which transferred jurisdiction to the court of seat of the businessperson. In this case, Mrs. Györfi did not even have to raise any objections because the court itself asked the ECJ for preliminary ruling, in particular whether the court has a duty to examine on its own motion its competence.

The ECJ de facto confirmed its previous ruling that the Directive cannot be interpreted as meaning that it is only in the event that the consumer has brought a specific application in relation to it, that an unfair contract term is not binding on that consumer. An unfair

contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand. However, if the consumer is informed about the fact that he did not have to be bound by this term and he expressed his wish to be bound by it then the term would be binding.

However, the ECJ limited court's activism in Asturcom judgment (C-40/08). In this case, arbitration proceedings against consumer, Mrs. Rodriguez Nogueira, were conducted. Mts. Rodriguez Nogueira neither did participate in the arbitration proceedings nor asked the court for annulment of the award therefore the award became final and binding. The ECJ ruled that if consumer is absolutely passive then court does not have to set aside award on its own motion. But the ECJ added that if a court can assess compatibility of an award with public order, it must do so also in case of EU law with similar nature. Since Spanish courts have such obligation under the Spanish law, they also have to assess compatibility of arbitration clause with the directive.

To summarize ECJ's judgments, the national courts, when dealing with arbitration clause (or prorogation clause since its nature is very similar to arbitration clause - both shift jurisdiction from a court, which would be under standard circumstances competent, to other body), has an obligation to examine ex offo whether arbitration clause does not present an unfair term. Fact that the consumer did not raise an objection of invalidity of arbitration clause in arbitration proceedings does not prevent him from raising this objection during proceedings before court.

Should the court come to conclusion that indeed this particular arbitration clause is an unfair term then the consumer cannot be bound by it. However, when the court comes to conclusion that clause presented is an unfair term, informs the consumer about this fact and consumer expresses his will to be bound by this clause then the court cannot decide against consumer's will that such a term is invalid.

In case national court is obliged to examine compatibility of arbitration clause with public order court must also examine its compatibility with directive 93/13/EEC because this directive has similar nature to public order. However, this last possibility is not applicable to the Czech Republic because the Arbitration Act does not give such possibility to courts.

## 3. CZECH JUDGMENTS REGARDING EXISTENCE OF ARBITRATION CLAUSES IN CONSUMER CONTRACTS

Recently, the Czech Republic has been experiencing problems with arbitration clauses in consumer contracts. Most commonly, consumers were not aware that the contract they signed included an arbitration clause. Another problem is connected with quasi-permanent arbitral bodies – in the Czech Republic, the Arbitration Act recognizes only ad hoc arbitration or arbitration before permanent arbitral institutions. However, recently many quasi-permanent arbitral institutions

occurred which are often connected with one or several business entities. This connection might raise doubts about impartiality and independence of the arbitrators who might even be paid according to the amount adjudicated. It is also not clear whether these institutions can serve as an appointing authority for arbitrators.

The Regional Court in Ostrava in case 33 Cm 13/2009 was deciding about claim arising out of loan contract, which contained an arbitration clause. On basis of this arbitration clause, an arbitration award was rendered, under which the consumer was obliged to pay remaining part of the loan together with contractual fine. The Court referred to directive 93/13EEC and when interpreting Civil Code it used euro-conform interpretation. According to Court's opinion, the directive 93/13/EEC, in particular letter q) of the Annex 1, considers all arbitration clauses as unfair terms and therefore arbitration clause is as unfair term invalid and arbitration award rendered on the basis of this clause is null.

The credit agency appealed and as an appellate court, the High Court in Olomouc was deciding. In its judgment 12 Cmo 13/2010, it came to conclusion that it is not possible to automatically consider all arbitration clauses in consumer contracts as unfair terms. According to Court's opinion, every arbitration clause contained in consumer contract must undertake an individual test, which will assess its compatibility with directive 93/13/EEC.

However, the High Court in Prague, when deciding about different matter (case 2 VSPH 14/2011) agreed with the Regional Court in Ostrava that arbitration clauses in consumer contracts are per se inadmissible, especially when they are concluded in favour of private arbitral institution which was not established in accordance with the Arbitration Act.

Nevertheless, the approach presented by the Regional Court in Ostrava and by the High Court in Prague that all arbitration clauses in consumer contracts are automatically invalid is not sustainable. This is obvious especially in the light of the amendment to the Arbitration Act, which is in process of adoption - this amendment distinguishes between consumer disputes and "normal" disputes (disputes when none of the parties is a consumer). Therefore, it could be assumed that arbitration clauses in consumer contracts are not automatically invalid otherwise this amendment would be pointless. Instead, approach requiring examination of every arbitration clause separately should be adopted.

This approach has indeed already been used by the Municipal Court in Brno which in its judgment 33 C 68/2008-60 assessed compatibility of an arbitration clause with the directive 93/13/EEC, i.e. whether it was individually negotiated etc. The court concluded that the arbitration clause was not individually negotiated and that it caused detriment to the consumer and as such it was invalid. As a result, the arbitral award was set aside.

## 4. CZECH JUDGMENTS REGARDING QUASI-PERMANENT INSTITUTIONS

As was already mentioned in previous section, there have been problems recently with quasi-permanent arbitral institutions. By this term, an institution which is not a permanent arbitral institution under the Arbitration Act and which usually provides arbitrators with functional background is meant. However, these institutions often appointed arbitrators therefore they acted as permanent arbitral institutions.

Regarding this issue, the Supreme Court in the past expressed an opinion (case 32 Cdo 2282/2008) that it was in accordance with the law if parties agreed that their dispute would be decided by particular arbitrator appointed by private entity which was not a permanent arbitral institution under the Arbitration Act and that the arbitration proceedings would be conducted under the Rulers issued by such private entity.

The High Court in Prague in its decision 12 Cmo 496/2008 embraced contradictory opinion when it concluded that reference to quasi-permanent institution as an appointing authority as well as reference to arbitration rules issued by such institution cause invalidity of the arbitration clause because of circumvention of law. This ruling was even concluded in the collection of the most important judgments adns as such should be followed by other courts. However, some courts did not follow this approach but followed earlier decision of the Supreme Court instead therefore the Supreme Court issued uniting opinion (case 31 Cdo 1945/2010). In this decision, the Supreme Court overruled its earlier decision and confirmed ruling of the High Court in Prague.

To conclude, the current position is that quasi-permanent institutions cannot appoint arbitrators or issue rules for conduct of arbitration proceedings since these activities are reserved only for the permanent arbitral institutions established under the Arbitration Act. Arbitration clauses concluded in contradiction with this approach are invalid under Section 39 of the Civil Code for circumvention of law.

## 5. AMENDMENT TO THE ARBITRATION ACT

Amendment to the Arbitration Act had already passed through the House of Parliament and had been discussed in the Senate on 7th December 2011. However, the Senate proposed further changes in the amendment therefore the amendment returned to the House of Parliament, which will vote on it again. This amendment focuses mostly on consumer disputes but it brings come changes for all arbitration proceedings. Regarding changes which will affect solely consumer disputes, those are:

Arbitration clause cannot contain name of a particular arbitrator;

Arbitration agreement must be contained in a separate document, otherwise is void;

Trader must provide consumer with explanation about the nature of an arbitration before conclusion of arbitration agreement;

There are stipulated necessary requirements about content of the arbitration agreement such as identification of arbitrator or permanent arbitral institution, manner of commencement and way of conduct of arbitration proceedings, remuneration of arbitrator(s) etc.;

Consumer disputes can be decided only by arbitrator from the list of arbitrators for consumer disputes which is kept by the Ministry of Justice;

Before commencement of arbitration proceedings, an arbitrator is obliged to disclose if in last three years, he rendered or participated in rendition of arbitral award in case where one of the parties was or is involved. The same applies for arbitration proceedings in progress;

Objection regarding lack of competence can be raised any time during proceedings;

Award must always contain reasoning and notice of right to file an application with the court for setting the award aside;

Arbitrators must always follow law on protection of consumer;

Non-compliance with abovementioned requirements establishes a reason for setting the award aside;

When a consumer files an application for the annulment of an award the court must ex offo examine compliance with provisions for consumer disputes;

When a consumer files an application for the annulment of an award the court must ex offo examine existence of reasons for postponement of execution of the award;

Objections regarding lack of competence or competence of arbitrator(s) can be raised during annulment proceedings even if they were not raised during arbitration proceedings;

The Ministry of Justice keeps a list of arbitrators who can serve in consumer disputes. Person can be added to the list upon his proposal if the person has legal capacity, does not have a criminal record, has a university degree in law, paid a fee of 5 000 CZK (approximately €200) and has not been crossed from this list in last five years. An arbitrator can be crossed from the list inter alia in case he severally and repeatedly breached his duties arising out of the Arbitration Act.

The Senate proposed that arbitrators for consumer disputes should undertake an exam, which would ensure that they have a thorough

knowledge of law on consumer protection. Persons who passed bar exam or judiciary exam would not have to undertake this exam. Ministry of Justice as a sponsor of the bill did not agree with this proposal.

There is a very high probability that the amendment will pass in the House of Parliament. However, it is unsure whether Senate's proposal will pass as well.

## 6. NEW CIVIL CODE

The New Civil Code improves transposition of directive 93/13/EEC but only partly - letter q) of the Annex will be included but there are still several problems. One of them is systematic position of provisions transposing the directive. These provisions in the current version of the New Civil Code will be in a separate section immediately after the section on accessory contracts. However, there is no provision on the connection of these two sections therefore the only possibility is the relation between general and special provisions[2].

Regarding the definition of the unfair term, the New Civil Code brings significant change when it construes this definition as a refutable presumption. This construction is not in accordance with the directive because under the directive these terms are always considered unfair, i.e. under the directive they are defined as irrefutable presumption. There is also one change in the definition itself - the New Civil Code substitutes requirement principle of good faith with the requirement of adequacy. Adequacy is not mentioned in the original definition in the directive therefore it is not clear why this change happened since it did not correct the inaccurate transposition of the directive.

## 7. CONCLUSION

To conclude, the directive 93/13/EEC was not transposed accurately to the Czech law and it is unclear whether the New Civil Code will improve the situation. However, the definition of unfair term and translation of this term instead still remains inaccurate.

On the other hand, it is very positive that Czech courts are aware of this problem with transposition of the directive as well as of relevant ECJ´s case law and they try to reflect both when interpreting relevant provisions of the Civil Code.

Regarding existing problems with arbitration clauses in consumer disputes, only a few cases where an arbitration award was rendered go before court because consumers are not aware of the consequences of arbitration award or do not know about the possibility to go to the

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[2] Pelikánová, Irena (2011): České právo, Evropa a rozhodčí doložky. Bulletin advokacie 10/2011, p. 17 et following.

court to ask for annulment. From these reasons, it is unsure whether the approach of inadmissibility of appointing arbitrators by quasi-permanent institutions will help to tackle these issues - if the consumer did not raise the objection of invalidity of arbitration clause during the arbitration proceedings it cannot be raised during court proceedings. In this matter, the Amendment to the Arbitration Act should improve the situation because it states that in consumer disputes, objection regarding lack of competence of the arbitrator(s) can be raised any time during proceedings as well as only in the court proceedings. It is true that this provision diminishes the efficiency of arbitration but this restriction follows the aim of consumer protection. As a result, arbitration proceedings might be less used in consumer cases.

Other changes under the amendment include an obligation of a businessperson to explain the nature of arbitration. The amendment also requires arbitration agreement to be contained in a separate document. This provision does not really solve a problem when consumers are forced to either sign a contract with arbitration clause or have no contract at all. Under this provision, arbitration agreement will be still signed together with the main contract so the consumers will have to face the same dilemma as now. The solution would be if the arbitration agreement could be concluded only after the dispute occurred - in this case, it would be absolutely independent on the main contract and consumer could freely choose whether he wants to sign it or not.

Currently, it is also common that consumers do not read the contract before they sign it so they are often not aware that there is an arbitration clause. However, even if the arbitration agreement is on the separate sheet of paper it does not ensure that the consumer will read it. It is true that this way he will at least know that there is an arbitration agreement but he can still be forced to sign it even if he does not want to as explained above. The businessperson will have to inform consumer about the nature of arbitration but the amendment does not specify how it should be done. Probably the written form will be used which the consumer will sign so the businessperson can prove that he fulfilled his informational obligation towards consumer. But this does not ensure that the consumer will actually read what he signs and that he will understand the presented text.

One of quite effective ways how to restrict arbitration in consumer disputes could be by the list of arbitrators for consumer disputes. Consumer disputes are generally not very attractive for arbitrators because they usually concern only relatively small amounts of money. Therefore, there might be only a few arbitrators interested in entering the list. This would efficiently limit the consumer disputes solved by arbitration because there simply would not be enough arbitrators. Number of interested arbitrators might be even lower if they needed to pass an exam as suggested by the Senate.

To sum up, the inaccurate transposition of the directive does not have a strong effect on the court´s decisions because they are aware of this

inaccuracy. Existing problems regarding the arbitration clauses in consumer disputes might be at least partly solved by the amendment to the Arbitration act even though it is not clear when it will pass and in which version

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