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

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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

Resumé

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 a unfair contract term under the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter "Directive").

The ECJ decided in the case *Claro v Móvil* (hereinafter "Claro") 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 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 Arbitration Act and Civil Code is analysed. The conclusion of the analysis is that article 33 of the Arbitration Act as well as article 55(2) of the Civil Code are at odds with the mandatory rule contained in the article 6(1) of the Directive, which stipulates 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.

The article 33 of the Arbitration Act determines that court shall refuse the claim which seeks to annul arbitration award based on nullity of arbitration clause, if the party seeking for annulment of arbitration award, did not object the nullity of arbitration clause in the course of arbitration proceedings, although she was able to do so. The requirement of objecting the nullity of the arbitration clause by the consumer only during the arbitration proceedings is, as expressed by the ECJ in the *Claro* case, contrary to the European public policy, i.e. mandatory provision of the Directive.

As for the situation in the Czech Republic, there are principally two ways, how may consumers defend themselves again arbitration clauses included in standard contract terms. First, 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 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, 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. This is perhaps the most probable outcome, although the way leading to the compensation by the Czech state would be thorny and exhausting.

However, there is another path, how the Czech consumers may fight against the using of unfair arbitration clauses by businessmen. My impression is 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. 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 provides that *"anyone may claim her right before independent and impartial court and in defined situations before the other institutions."* 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.

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. Hence, if the term is favourable to consumer, then he will not claim its invalidity. 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 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

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