ALTERNATIVE DISPUTES RESOLUTION FOR CONSUMER CONTRACTS: CHALLENGES FOR EU AND ITS IMPLEMENTATION IN SLOVAKIA

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Abstract

This paper focuses on current challenges in arbitration law in the context of consumer contracts. It starts with a brief introduction on need to regulate this very specific area by considering arguments for and against the arbitration clauses in consumer contracts in general. The authors then move onto short history excursion on "prohibition" of alternative dispute resolution in the EU with emphasis on current EU legal framework - Directive 2013/11/EU on alternative dispute resolution for consumer disputes (the "Directive") and Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes. As a result of this activity on EU level, a new Slovak legislation implementing the Directive has come into force on January 1, 2015 separating the consumer arbitration from the "general commercial arbitration" which raised several questions by public that remained unanswered. Authors discuss this new legislation in depth taking into consideration practical aspects and implications. Final remarks contain predictions on further development of consumer arbitration.

Keywords

Arbitration Law; Arbitration Clauses in Consumer Contracts; Online Dispute Resolution; New Slovak Consumer Arbitration Law.

1 Introductory Remarks

The consumer protection in the European Union ("EU") has enjoyed in recent years significant level of attention and activity on the EU level

as well as on the Member States level with a goal to secure a certain level of protection to consumers as a weaker party in B2C contracts and to ensure access to simple, efficient, fast and low-cost out-of-court resolution of disputes between consumers and traders. With litigation taking in some Member States several years on average, bringing uncertainty to B2C contracts, it is definitely desirable to create an alternative improving functioning of the retail internal market and enhance redress for consumers. According to various conducted studies at that time, a substantial portion of European consumers encounter problems when buying goods and services in the internal market. Unfortunately, despite the best efforts, the previous attempts to create an effective consumer dispute resolution ("CDR") network were unsuccessful and patchy. The main identified shortcomings were gaps in the coverage, the lack of consumer and business awareness as well as the uneven quality of alternative dispute resolution ("ADR") procedures. Should CDR become a successful tool, it would need to ensure quality and maintain high standards of independence, transparency, legal expertise and fair-decision making in every single Member State.

The purpose of this article is to examine the development of law in respect to resolution of the consumer disputes firstly on EU level and then, specifically review the new legislation in the Slovak Republic with aim to provide the reader overview of the legislation as well as insights in respect to specific implementation questions relevant for the Act No 335/2014 Coll., Consumer Abitration Act ("Consumer Arbitration Act").[1]

2 Arbitration in the EU Law in General

Arbitration rules (e.g. arbitrability, arbitration proceedings, recognition and enforcement of arbitral awards) are not contained in any binding source of the EU nor do they have any explicit legal basis in EU primary law.

It is a matter of fact that the original version of the Treaty on Establishing of the European Economic Community ("TEEC") as of January 1, 1958 contained in Article 220 provisions according to which:

1 SLOVAK REPUBLIC. Act No. 335/2014 Coll., Consumer Arbitration Act.

"*Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:*

- *the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals;*
- *the abolition of double taxation within the Community;*
- *the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries;*
- *the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.*"

The original wording of the TEEC thus established the possibility ("so far as is necessary") for the Member States to conclude among themselves a specific international agreement, which should have regulated rules "governing the mutual recognition and enforcement of arbitral awards".

The abovementioned mandate of the Member States was never exercised because on June 10, 1958 (i.e., 6 months after the formation of the EEC) was entered into the New York Convention[2] which was subsequently executed and ratified by all six founding Member States. This was also the reason why there was no further need to adopt similar legislation on EEC level.[3] This position of the Member States was also maintained during accessions of further Member States and was, at the end, confirmed by conclusion of the Treaty of Lisbon, which omitted Article 220 of TEEC, renumbered by the Amsterdam Treaty as Article 293. The current legal basis provided for in Article 81 of the Treaty on Functioning of the European Union[4] ("TFEU") does not allow adoption of legal acts of the EU on the recognition and enforcement of arbitral awards, but only judicial and extrajudicial decisions (e.g., public deeds, notarial deeds).

2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) [online]. *United Nations Commission on International Trade Law (UNCITRAL).* Available from: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf ("New York Convention").

3 Parties to the New York Convention are currently all 28 EU Member States.

4 Treaty on Functioning of the European Union. In *EUR-lex.* Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.

The current wording of primary EU law does not contain the power to adopt binding (mainly secondary) source of EU law in area of jurisdiction or the recognition and enforcement of arbitral awards. Furthermore, under paragraph 12(3) Preamble to Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I recast")[5] the New York Convention takes precedence over this regulation.

The primary EU law does not contain express powers of the EU to adopt binding EU legal acts not only in the area of the recognition and enforcement of arbitral awards, but also in areas of other (basic) procedural aspects of arbitration proceedings.

Despite abovementioned, the supervision in respect to the arbitration proceedings is exercised primarily on the basis of powers established under Arts. 4(2)(f) and 169 TFEU[6] within the limits of Art. 12 TFEU (*"Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities."*) mainly through binding secondary legislation (regulations, directives, decisions), but also non-binding (recommendations, opinions, white papers, green papers etc.). The specific legal basis for adoption of the secondary law in areas of consumer protection is Art. 169 TFEU (as part of Title XV "Consumer Protection" of the Part Three "Union Policies and Internal Actions" of TFEU), which reads as follows:

"1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

2.1 measures adopted pursuant to Article 114 in the context of the completion of the internal market;

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5 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In *EUR-lex*. Available from: http://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:32000L0031 & rid=1

6 See BĚLOHLÁVEK, Alexander J. *Ochrana spotřebitelů v rozhodčím řízení*. Praha: C.H. Beck, 2012. p. 79.

2.2 measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them."

In addition, it is possible, either independently, or together with provisions on consumer protection, to apply a relating legal basis contained in Art. 114 TFEU (Approximation of Laws).[7] Such legal basis was recently used for creation of two mechanisms of out-of-court consumer dispute resolution, specifically, for adoption of:

- Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC Regulation on consumer ODR)[8] ("ODR Regulation"),
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)[9] ("CDR Directive").

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7 Under Article 114 TFEU, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures (i.e. regulations, directives or decisions) for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market, save where the Treaty on European Union or Treaty on Functioning of the European Union do not contain (special) legal basis (for details see SVOBODA, Pavel *Úvod do evropského práva.* 4th ed. Praha: C.H. Beck, 2011. p. 111 - 116).

8 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). In *EUR-lex.* Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0524 & rid=1 ("ODR Regulation").

9 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). In *EUR-lex.* Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011 & rid=1 ("CDR Directive").

In EU primary law, there is a specific provision included also in the Art. 38 Charter of Fundamental Rights of the European Union,[10] which provides that the Union policies shall ensure a high level of consumer protection. Explanatory notes[11] to Art. 38 provide that *"the principles contained in this Article are based on Article 169 of the Treaty on Functioning of the European Union."*

3 Significance of the Directive 93/13/EEC on Unfair Terms in Consumer Contracts

A significant impact on the possibility to decide consumer disputes in arbitration proceedings have provisions of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[12] ("Directive 93/13/EEC") and the related case law of the European Court of Justice, which interprets the relevant provisions of the directive.

The basic goal of the Directive 93/13/EEC is for the Member States to "*ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions*" (paragraph 25 Preamble to the Directive 93/13/EEC). This means that in the definition of "unfair terms", the directive specifies the obligations on Member States to provide in their national legislation that unfair terms used in a contract concluded with a consumer by seller or supplier under their national law shall 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 (see Art. 6(1) Directive 93/13/EEC).

10 Charter of Fundamental Rights of the European Union. In *EUR-lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

11 Under Article 52(7) Charter of Fundamental Rights of the European Union: *"The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."*

12 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. In *EUR-lex*. Available from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013 & rid=2 ("Directive 93/13/EEC").

For the purposes of the Directive 93/13/EEC "unfair terms" mean contractual terms defined in Art. 3 (see Art. 2 letter a)). Unfair terms are as provided in provisions of Art. 3:

- a contractual term which has not been individually negotiated (i.e. it was drafted in advance and the consumer has therefore not been able to influence the substance of contractual term,[13] particularly in the context of a pre-formulated standard contract[14]) and, at the same time;
- 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.

The definition of "unfair terms" in the Directive 93/13/EEC is general in its nature, particularly in relation to term "causes a significant imbalance in the parties' rights and obligations arising under the contract". Therefore, the Directive 93/13/EEC further specifies criteria in Art. 4(1) for assessing the aspect of unfairness providing that: *"the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent."*

This definition can be complemented with an authentic interpretation provided in paragraph 20 Preamble to the Directive 93/13/EEC, according to which in the evaluation of unfair contract terms, it is necessary to take into account:

"1. overall evaluation of the different interests involved [consumer and seller or supplier];

2. requirement of good faith,[15] when making an assessment of good faith, the following shall be taken into account:

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13 Under Art. 3(2) Directive 93/13/EEC: *"Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him."*

14 Under Art. 3(2) Directive 93/13/EEC: *"The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract."*

15 The Slovak wording of this provision does not reflect, for example, French or English wording of the Directive 93/13(EEC (use of term „dobrá viera" instead of word „dôvera" in Slovak wording). An incorrect translation is confirmed in judgment of the Court of Justice of 14 March 2013. Mohamed Aziz vs. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa). Case C-415/11 ("Case C-415/11").

2.1 strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer;

2.2 the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account."

An assessment of unfair terms under several provisions of the Directive 93/13/EEC cannot be carried out in relation to all (any) provisions of consumer contract. The Directive 93/13/EEC lays down in this respect two exceptions, which without any further condition and with immediate effect (automatically) cause an exclusion from the scope of application of the directive:

- the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the EU are party, particularly in the transport area, shall not be subject to the provisions of the directive (Art. 1(2));
- assessment of the unfair nature of the terms does not relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language (Art. 1(2)).[16]

As an additional exception, which, on the other hand, does not cause immediate exclusion from the scope of application of the Directive 93/13/EEC, includes the terms in consumer disputes which has been individually negotiated (i.e., and contrary, provisions of Art. 3(2) were included subsequently and the consumer has therefore been able to influence the substance of the term, or acceptance of this condition was not subject to the consent of different/other terms of the contract).

Under Art. 3(2) Directive 93/13/EEC: "*Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall*

16 Slovak wording does not reflect accurately for example French, English or Czech wording of the Directive 93/13/EEC in respect to "adequacy of the price and remuneration" a "intelligible language" (compare, for example, Czech wording: "*Posouzení nepřiměřené povahy podmínek se netýká ani definice hlavního předmětu smlouvy, ani přiměřenosti ceny a odměny na straně jedné, ani služeb nebo zboží dodávaných výměnou na straně druhé, pokud jsou tyto podmínky sepsány jasným a srozumitelným jazykem.*")

be incumbent on him." and further, in addition it specifies that, "the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract."

In respect to this specific exception, it can be concluded, that its application does not occur automatically, but only on the basis of an objection by seller or supplier (Art. 3(2) Directive 93/13/EEC) and other terms and conditions are not excluded from the scope of application of the directive (which applies also to both abovementioned conditions).

Art. 3(3) Directive 93/13/EEC further refers to the Annex attached to the directive containing an indicative and non-exhaustive list of the terms, which may be regarded as unfair. Under paragraph 21 Preamble to the Directive 93/13/EEC, "*the annexed list of terms can be of indicative value only and, because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws*".

Under the findings of the Court of Justice in the judgment of 14 March 2013, Mohamed Aziz vs. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), case C-415/11 ("Case C-415/11"),[17] Art. 3(3) Directive 93/13/EEC shall be interpreted as meaning that the annex referred to in this provision contains only indicative and non-exhaustive list of the terms, which may be regarded as unfair.[18] Based on the content of that Annex, it cannot be automatically established that the disputed contract term is unfair in its nature. Nevertheless, it constitutes an essential element on which the relevant court may base its assessment of the unfair nature of such contractual term (see para. 26 of the judgment of the Court of Justice of 26 April 2012, Nemzeti Fogyasztóvédelmi Hatóság vs. Invitel Távközlési Zrt, case C-472/10[19]).

17 Case C-415/11.

18 Case C-415/11; Judgment of the Court of Justice of 4 June 2009. Pannon GSM Zrt vs. Erzsébet Sustikné Győrfi. Case C-243/08, paras 37 – 38; Order of the Court of Justice of 16 November 2010, Pohotovosť, s. r. o. vs. Iveta Korčkovská. Case C-76/10, paras 56 and 58.

19 Judgment of the Court of Justice of 26 April 2012. Nemzeti Fogyasztóvédelmi Hatóság vs. Invitel Távközlési Zrt. Case C-472/10.

The condition provided in the Directive does not necessarily cause for the unfairness of the contract terms, and contrary, not always and under every circumstances can be any condition regarded as fair on the basis that it is not included in the Annex. The list of terms provided in the Annex to the Directive 93/13/EEC allows for a high degree of probability on the basis of long-term monitoring. It is clear from all language mutations of the provisions of Directive 93/13/EEC that it shows only examples, i.e. indicative tools, and not binding provisions.[20]

It can also be noted that under the case law of the Court of Justice, the list of unfair terms provided in Annex to the Directive 93/13/EEC does not have to be transposed into national legislation due to the fact that it does not confer additional rights to individuals to the rights resulting from provisions of Arts. 3 and 7 Directive 93/13/EEC, i.e. the Annex has only informative and demonstrative nature, constitutes a source of information for national authorities responsible for application of transposed provisions and for individuals affected by those measures.[21]

In respect to possibility of including a separate arbitration agreement or arbitration clause in the consumer contract as a method of deciding consumer disputes within the scope of Annex to the Directive 93/13/EEC it must be noted that:

- Letter i) of the Annex under which as unfair terms can be considered those terms of contracts which have the object or effect of "*irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract*" and, particularly,
- letter q) of the Annex under which as unfair terms can be considered terms which have the object or effect of "*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.*"

20 See BĚLOHLÁVEK, Alexander J. *Ochrana spotřebitelů v rozhodčím řízení*. Praha: C.H. Beck, 2012. p. 82 – 83.

21 See Judgment of the Court of Justice of 7 May 2002. Commission of the European Communities vs. Kingdom of Sweden. Case C-478/99, paras. 21 - 23.

Ad 1)

This condition does not preclude the inclusion of such a contractual term that prescribes dispute resolution in form of an arbitration proceedings, which irrevocably obliges the consumer to participate in arbitration despite inability to get familiar with them before the conclusion of the contract (an example is the reference to the general terms and conditions which are not readily available to consumer or are not properly disclosed in any manner).

Ad 2)

In particular, it should be noted that the said provision of the Slovak translation of Directive 93/13/EEC is incorrectly translated as "*vyžadovať od spotrebiteľa, aby riešil spory neupravené právnymi ustanoveniami výhradne arbitrážou*" (meaning: requiring the consumer to take disputes not covered by legal provisions exclusively to arbitration). We would like to point to other language mutations of the directive in this respect:

English wording:

"*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*" [...];

French wording:

"*de supprimer ou d'entraver l'exercice d'actions en justice ou des voies de recours par le consommateur, notamment en obligeant le consommateur à saisir exclusivement une juridiction d'arbitrage non couverte par des dispositions légales*" [...];

German wording:

"*dem Verbraucher die Möglichkeit, Rechtsbehelfe bei Gericht einzulegen oder sonstige Beschwerdemittel zu ergreifen, genommen oder erschwert wird, und zwar insbesondere dadurch, daß er ausschließlich auf ein nicht unter die rechtlichen Bestimmungen fallenden Schiedsgerichtsverfahren verwiesen wird*" [...].

As correct wording (translation) can be considered also Czech version of letter q) subs. 1 of Annex to the Directive 93/13/EEC:

"*zbavení spotřebitele práva podat žalobu nebo použít jiný opravný prostředek, zejména požadovat na spotřebiteli, aby předkládal spory výlučně rozhodčímu soudu, na který se nevztahují ustanovení právních předpisů*" [...].

It is clear from the above language versions of letter q) subs. 1 of Annex 1 to the Directive 93/13/EEC that the attribute "*not covered by legal provisions*" refers to arbitration. This means that a consumer contract shall not require a consumer to settle any disputes by some special type of arbitration, which is not regulated by legal provisions and where judges are probably not required to apply relevant substantive law.[22] In respect to the abovementioned erroneous translation of letter q) of the Annex to the Directive 93/13/EEC in Slovak version of Official Journal of EU we include also the relevant case law of the Court of Justice, which held that to satisfy the requirement of uniform application and uniform interpretation of the EU law, it is necessary to examine the wording of EU legislation in all of its official languages and take into consideration actual intentions of the legislator and the objective of the legislation itself.[23] If the interpretation of a provision of EU law in various language versions is different, it must be interpreted according to the general scope and objective of the legislation, of which it forms a part.[24] In this context of Cour of Justice's decisions, the Slovak general courts is obliged to apply letter q) sec. 1 of Annex to the Directive 93/13/EEC having regard to the wording in other language versions.

In order to determine whether the beforementioned provisions of Directive 93/13/EEC prohibits deciding of consumer disputes in arbitration, the case law of the Court of Justice should also be mentioned, particularly in respect to interpretation of the relevant provisions directly concerned and/or in different context relating to issues of arbitration of consumer disputes. Court of Justice has issued several judgements and reasoned orders without precise and clear statement, that deciding of consumer disputes

22 Besides this argument we can provide also provisions of Sec. 31(3) SLOVAK REPUBLIC. Act No. 244/2002 Coll., Arbitration Act ("Arbitration Act") valid for consumer disputes until 31. 12. 2014: "*An arbitration tribunal shall apply, in same manner as courts, the generally binding legal regulations in respect to consumer protection.*"

23 Judgment of the Court of Justice of 1 April 2004. Privat-Molkerei Borgmann GmbH & Co. KG vs. Hauptzollamt Dortmund. Case C-1/02, para. 25; Judgment of the Court of Justice of 6 October 1982. Srl CILFIT and Lanificio di Gavardo SpA vs. Ministry of Health. Case 283/81, para. 18.

24 See e.g. Judgment of the Court of Justice of 3 Apirl 2008. Criminal proceedings against Dirk Endendijk. Case C-187/07, para. 22 - 24 and Judgment of the Court of Justice of 19 April 2007. UAB Profisa vs. Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos. Case C-63/06, para 13 and 14.

in arbitration is prohibited. Slovak courts have misinterpreted for example judgment of the Court of Justice of 26 October 2006, Elisa María Mostaza Claro vs. Centro Móvil Milenium SL, case C-168/05 ("Case C-168/05"),[25] stating that the Court of Justice has ruled out that the arbitration clause is always unfair condition within B2C contracts.[26] Within "*Preliminary observations*" of the Court of Justice (paras. 21 to 23) there is clear, that: *"It is apparent from the documents sent to the Court by the Audiencia Provincial that the latter has established that the arbitration clause contained in the contract concluded between Móvil and Ms Mostaza Claro was unfair. In that respect, it must be recalled that the Court may not rule on the application of general criteria used by the Community legislature in order to define the concept of unfair term to a particular term, which must be considered in the light of the particular circumstances of the case in question (Case C-237/02 Freiburger Kommunalbauten [2004] ECR I-3403, paragraph 22)."* Some Member States (esp. Czech Republic, Latvia and the Netherlands) act on the provision that unfair clauses are binding unless the consumer invokes unfairness. This legal consequence contradicts the requirements of the Court of Justice, which explicitly emphasised, that unfairness is to be determined on the court's own motion.

4 Progressive Building of Consumer Dispute Resolution Bodies Network

As a further step in improving consumers' rights in respect to resolution of disputes involving consumers, two pieces of legislation were passed in 2013 with an ambitious goal to build by 2015 a comprehensive network of consumer alternative dispute resolution bodies - ODR Regulation and CDR Directive.

The ODR Regulation obliges the European Commission to build an online platform to facilitate communication between the parties and a certified ADR provider, in the event of a contractual dispute arising from an online transaction. It should be noted, that this platform shall not seek to resolve

25 Judgment of the Court of Justice of 26 October 2006. Elisa María Mostaza Claro vs. Centro Móvil Milenium SL. Case C-168/05 ("Case C-168/05").

26 See e.g. Decision of District Court Topolcany, Slovak Republic of 5 September 2012, No. 11Er/192/2006-90 or Decision of Regional Court Banska Bystrica, Slovak Republic of 11 July 2012, No. 41 CoE/147/2012.

the disputes itself, but rather channel the disputes to a relevant ADR scheme and make available an electronic case management system tool for ADR providers. The platform shall be operational by January 2016.

The CDR Directive requires creation of CDR system in each Member State to cover all disputes initiated by an EU consumer against any trader in its territory relating to online and offline sales and services contracts, domestic as well as cross-border. The focus is put on the entities conducting the ADR and quality of the decision making-process. The main goal is to improve the internal market by encouraging cross-border trade while ensuring EU-wide access by consumers in every Member State to ADR entities which, in combination, comprehensively cover all business sectors in every territory, and which comply with a number of quality criteria. Such qualified ADR entities will then be listed by competent authorities within each Member State, and by the Commission. Inclusion in the list will therefore be a guarantee to a consumer anywhere in the EU that the ADR entity has the requisite characteristics to ensure an independent, impartial, transparent, effective, fast and fair resolution of the dispute in question.

It is important to note, that despite promoting ADR, the system is built on voluntary basis and according to Art. 1 CDR Directive does not prevent the parties from exercising their right of access to the judicial system of Member States. As mentioned above, under Art. 1 CDR Directive, it applies to sales contracts or service contracts between a trader established in the EU and a consumer resident in the EU. Excluded from the scope of the CDR Directive, under Art. 2 are B2B disputes, disputes initiated by a business against a customer, disputes regarding health services provided by health services professionals to patients and disputes regarding public providers of further or higher education. To summarize the requirements into few sentences, the CDR Directive requires Member States to facilitate access by consumers to ADR procedures on their respective territories allowing to submit the dispute covered in the CDR Directive to an "ADR entity" which is under Art. 4(1)(h) defined broadly as an entity, however named or referred to which is established on a durable basis and offers the resolution of a dispute through and ADR procedure and that is listed by a competent authority upon assessment of quality requirements for these entities set

out in the CDR Directive. Such a broad definition of an ADR entity offers various possible solutions for implementation by Member States. It further sets out requirements on natural persons who are in charge of ADR processes and rules ensuring transparency of ADR processes through ensuring that ADR entities make publicly available (on their websites, on a durable medium upon request, and by any other means they consider appropriate) information relevant to the ADR processes.

In respect to effectiveness, as consumers are very sensitive group in respect to costs of proceedings, it is required that the ADR procedure is free of charge or available at a nominal fee without consumer being obliged to retain a lawyer or legal advisor. Strong arguments were made for dropping any charge for consumers, *"the historical rationale for imposing a charge on both parties to arbitration may no longer apply in relation to contemporary ideas on encouraging consumers to raise problems with low values, especially if ill-founded claims are weeded out at an initial triage stage. A counterargument might be that requiring a modest change in some types of case is a rational barrier that assists some consumers to reduce inflated demands to reasonable levels."*[27] In relation to funding of CDR, there were calls made for business support of CDR funding and in some Member States it is believed that costs of CDR shall be borne by Member States as a matter of social policy.

Furthermore, the CDR Directive sets forth the framework for ensuring fairness, liberty (in the sense that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute) and provision of information to overcome what has been called an "information barrier" that consumers had to face as in many Member States they simply were not aware of their respective rights.

The CDR Directive aims also to ensure designing an effective control of the whole CDR system as well as ADR entities and conducting of dispute resolution by a duty of designating a competent authority that shall carry out these controlling functions.

27 HODGES, Christopher; CREUTZFELDT, Naomi. *Implementing the EU Consumer ADR Directive* [online]. [cit. 2015-05-04], p. 4.

Under Art. 25(1) CDR Directive, the Member States shall comply with CDR Directive and implement the respective provisions by 9 July 2015. This is considered by some Member States, with not as highly developed system of CDR, as quite challenging deadline. The uncertainty grows also in respect to interpretation of certain standards set out in the CDR Directive, for example, what are the indicators for "quality of ADR entity" – is it only institutional capacity and natural persons with high expertise? What should be the dimensions of expertise, independence and impartiality? Another issue stems from lack of use of online CDR in particular in Eastern Europe. The imposition of a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform will require data arrangements so that case information can be transferred from the platform to a specific provider.

Another important question is the balance between rights of consumers and need for their protection and potential misuse of the rights of consumers for their own benefit. As *Bělohlávek* noted in his work: "… *consumers have grown accustomed to the practice of exercising their right to rescind (cancel) the contract by statutory deadline while, in the meantime, they actively used the goods and the reby fulfil the purpose of the purchase. Besides, even a consumer ought to be required to exhibit a reasonable and usual degree of responsibility for his or her legal (juridical) acts, including the conclusion of contracts and assumption of obligations.*"[28]

Currently, there are over 750 ADR schemes in the EU. They work differently in each Member State, having also different names, such as arbitration, mediation, ombudsmen and complaints boards.[29] One feature that is common to all ADR schemes in Member States is to ensure for consumers faster access to a redress. The good news definitely is that on average, the ADR complaints were handled within three months of their lodgement.[30]

28 BĚLOHLÁVEK, Alexander: Arbitrability Limitation in Consumer (B2C) Disputes?: Consumers' Protection as Legal and Economic Phenomenon. *Risk Governance & Control: Financial Markets & Institutions.* 2011, Vol. 1, No 3.

29 *Alternative and Online Distpute Resolution (ADR/ODR)* [online]. European Commission [cit. 2015-10-19].

30 *Swiss Re/CMS Research Programme on Civil Justice Systems* [online]. Third Oxford Consumer ADR Conference, Consumer Dispute Resolution – Implementing the Directive [cit. 2015-05-04], p. 6.

5 CDR in the Slovak Republic - Consumer Arbitration Act

After, in Slovak conditions, a long legislative process of 2 years, came into effect on 1 January 2015, a substantial change to Slovakia's arbitration system which separated consumer arbitration from the "general" commercial arbitration and created a dispute resolution system that is, according to the Explanatory notes to the new Consumer Arbitration Act, a system of dispute resolution "very similar" to arbitration proceedings which creates grounds for institutional guarantees of fair and impartial decisions of the consumer matters by creating very strict borderlines to arbitration in this sensitive and much discussed area of the law.

First obvious goal of this new legislation was an implementation of the CDR Directive. Second goal was to address current, not very flattering, state of the matters, because in recent years arbitration was considered and seen by public in a very negative context due to exponential increase of bad experiences with decision-making of arbitral tribunal in consumer matters. General view in respect to consumer matters and arbitration proceedings was that although arbitration proceedings existed in Slovak legislation and could be used in consumer matters the previous scheme which was the same for consumer matters as well as commercial matters granted insufficient protection to consumers as weaker parties.

There were numerous issues with the arbitration proceedings in respect to consumers interlinked to each other that needed to be addressed in the new piece of legislation. First issue was Sec. 12(1) Arbitration Act. Under this provision, any legal entity may set up and maintain an arbitration court on its own cost and under conditions provided by the Arbitration Act. Indeed, in recent years, the Slovak Republic has seen mushrooming of the arbitration courts in the Slovak Republic, most of them focusing on CDR. As of today, there are 160 registered arbitration courts in the Slovak Republic out of which only couple of them are inactive.[31] Some academics and also public claimed that situation with arbitration courts got out of hands. For example, *Kubíček* noted: *"Practice proved concerns about potential abuse of the arbitration courts and their malpractice towards those who agreed that*

31 *Zoznam stálých rozhodcovských súdov* [online]. Ministerstvo spravedlivosti Slovenskej republiky [cit. 2015-10-19].

their future dispute will be decided by these newly established arbitration courts."[32] One of the reasons why consumer arbitration has become such a prolific area was the fact that litigation proceedings in the Slovak Republic, even in very simple cases, tend to take several years. Another reason for the malpractice is the increased availability of consumer credit from non-banking institutions, as consumer credit provided by banks has become less available to low-income groups of public after global financial crisis.

The issue was clearly visible in enforcement proceedings where courts often denied enforcement of judgments rendered in the arbitration against consumers by not granting a mandate to the court executor due to various reasons, most of them lying in a gross disproportion between rights and obligations of the consumer and the business, denying consumers' right of access to the state courts, unacceptable place of arbitration or inclusion of arbitration agreement in general terms and conditions of contracts where consumers could not affect the content of such terms and conditions or where they created part of so called formulary contract. In all of these cases the courts concluded that the arbitration agreement has not been agreed in valid manner and therefore a decision of an arbitral tribunal is not enforceable. As a result, courts denied enforcement for thousands of these decisions rendered in consumer arbitration.

As can be seen from examples above, the Slovak Republic stood in front of a very difficult task to address these issues and create a reliable consumer arbitration mechanism. The Consumer Arbitration Act as it stands is fully compliant with the CDR Directive and implements it without significant deviations and adapting the requirements to Slovak conditions. In this regard, *Chovancová* pointed out, while comparing consumer arbitration framework in various European jurisdiction that a thorough legal regulation of the arbitration with consumers proved to be significant for their protection. On the other hand, she also stressed that it needs to be kept in mind that protection of consumers has also its limits and cannot be regarded

32 KUBÍČEK, Pavol. Stále rozhodcovské súdy a príprava novej právnej úpravy rozhodcovského konania. In SUCHOŹA, Jozef; HUSÁR, Ján (ed.). *Právo, Obchod, Ekonomika IV., Zborník vedeckých prác.* Košice: UPJŠ Košice, 2014, p. 542

as protection against frivolousness and recklessness.[33] During the consultation period, the Consumer Arbitration Act has been subjected to criticism. For example, the former Minister of Justice, *Žitňanská* stated that *"the effect of the new legislation would be minimal and the costs of the implementation would be unnecessarily high."*[34] Others criticized the separation from the Arbitration Act as unnecessary step that is not required by the CDR Directive and as an alternative suggested conducting CDR by courts rather than arbitration courts.

Below is a short overview of CDR under the Consumer Arbitration Act. The scope of the Consumer Arbitration Act, set forth in Sec. 1 is expressed differently comparing to the CDR Directive. It provides that the Consumer Arbitration Act applies to consumer disputes regarding to which can be concluded an agreement on settlement under Sec. 585 Slovak Civil Code,[35] including the disputes on determination whether a right or legal relationship exists or not. Only consumer would have an urgent legal interest on the matter under the Consumer Arbitration Act. The Consumer Arbitration Act does not apply to disputes in relation to creation, change or termination of the ownership rights, disputes relating to personal status, disputes in connection with forced enforcement of the decision or those which arose in connection with bankruptcy proceedings or restructuring.

The place of arbitration can be only in the territory of the Slovak Republic. The Arbitration Act remains governing the recognition and enforcement of arbitral decisions.

The Consumer Arbitration Act further contains a definition of consumer dispute – "a consumer dispute is a dispute arising from the consumer contract or in connection with the consumer contract". The Consumer Arbitration Act does not contain definitions of consumer or supplier as these terms are defined in the Slovak Civil Code.

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33 CHOVANCOVÁ, Katarína. Rozhodcovské doložky v spotrebiteľských zmluvách. In SUCHOŹA, Jozef; HUSÁR, Ján (ed.). *Právo, Obchod, Ekonomika IV., Zborník vedeckých prác.* Košice: UPJŠ Košice, 2014, p.506 – 520.

34 *Borecov návrh spotrebiteľov účinne neochráni, tvrdí Žitňanská* [online]. SME Ekonomika [cit. 2015-10-19].

35 SLOVAK REPUBLIC. Act No. 40/1964 Coll., Civil Code.

One of the major changes brought by the Consumer Arbitration Act are the changes in respect to formal requirement of conclusion of the arbitration contract. The essential elements of the consumer arbitration agreement are set forth in Sec. 3, the consumer arbitration agreement must be in writing, the content and form has to be separated from the remainder of the consumer contract and shall not include any ancillary arrangements that are not relevant to the consumer arbitration agreement. This new provision is in contrast with previous state, where up to December 2014 an agreement on arbitration could take form of an arbitration clause, which was directly incorporated into the contract, usually in general terms and conditions. The written form is maintained even if the agreement has been concluded by electronic means that allow capturing of the content and identification of the contracting parties who concluded the consumer arbitration agreement. The consumer arbitration agreement shall not contain an agreement on certain arbitrator. Last but not the least, the conclusion of the consumer agreement cannot be conditioned by conclusion of the consumer arbitration agreement.

As an important duty for the suppliers that had to be implemented in their business workflow is the provision of information to consumers, sample of which appears in the Annex to the Consumer Arbitration Act. This information sheet provides a consumer with a brief guide on how to proceed in case of a dispute listing, in particular, respective rights of the consumers.

A very important right granted to consumer by the Consumer Arbitration Act is to turn with the dispute, even though there is a valid arbitration agreement, to the Slovak courts. This is obviously not the case for commercial arbitration where conclusion of the arbitration agreement precludes the jurisdiction of the courts. As a result the businesses would have to deal with the option that despite validly concluded arbitration clause, the consumer can choose whether to lodge the action with the selected arbitration court or with general courts. This exemption however ceases to be available if the respective arbitration proceedings commenced at consumer arbitration tribunal, i.e. *lis pendens* rule.

The approach in respect to fees and costs is that CDR should be approachable to consumers. Therefore, an initiation of proceedings, any other related

submissions including submission of evidence are free of charge for consumers and the arbitration court might only require court fees from the party which is not a consumer. Any remuneration of the arbitration in CDR disputes is independent from the outcome of the proceedings. An action for annulment of the arbitral award can be lodged by filling out a sample form attached to the Consumer Arbitration Act within three months after delivery of the arbitral award. The time period of three months was also criticized as unnecessarily long comparing to time period for appeal, which is 15 days under Slovak Civil Procedure Code.[36]

Becoming an arbitrator or to set up a arbitration court was not difficult before commencement of the Consumer Arbitration Act. Currently, the special permanent CDR arbitration courts set up under the Consumer Arbitration Act are under stricter supervision and have notification duties in compliance with CDR Directive as consumers and consumer disputes are a separate category. The arbitrators shall also meet stringent criteria that include university education in area of law, at least 5 years of legal experience and the professional examination before a commission appointed by the Minister of Justice. After successfully passing the examination they will be registered to the list of arbitrators eligible to decide consumer disputes.

At this stage, it is too early for evaluation of success rate of this new legislation. As of today, only one permanent CDR arbitration court has been registered with the Slovak Ministry of Justice[37] and the new procedure has not become fully operative. It has to be also noted that as part of second stage of implementation of ADR Directive, there is currently at consultative stage a new draft of legislation on alternative resolution of consumer disputes which draft was lodged for consultation on 12 March 2015. One of the objectives of the legislation draft is to even strengthen the position of consumers by offering to consumers other methods of dispute resolution in addition to arbitration proceedings.

36 SLOVAK REPUBLIC. Act No. 99/1963 Coll., Civil Procedure Code.

37 *Zoznam rozhodcovských súdov oprávnených rozhodovať spotrebiteľské spory* [online]. Ministerstvo spravedlivosti Slovenskej republiky [cit. 2015-10-19].

6 Conclusion

The implementation of CDR methods in Central and Eastern Europe proved to be challenging as historically these countries do not have such a CDR heritage to build upon as countries in Western Europe. As a result, when improving our CDR system, we can definitely repurpose what has been successful in other Member States.

A regular strengthening of consumer protection in EU legal system has become a standard, so the new Slovak legislation copying this trend certainly makes sense from the consumer perspective. The Slovak Consumer Arbitration Act creates new system of CDR which is separated from commercial arbitration and aims to create safeguards that should prevent misuse of arbitration by some entities (particularly non-banking institutions) and creates a separate network of permanent consumer arbitration courts with trained arbitrators that have to have a legal degree and certain experience in the area. When comparing the Slovak CDR system to other systems in Europe we can definitely see the lack of other dispute resolution methods such as mediation of consumer disputes or creation of specific CDR bodies such as ombudsmans for certain specific areas of disputes, however a draft of new legislation on resolution of consumer disputes shall address this shortcoming. Despite certain criticism, the new legislation is definitely a step forward. On the other hand, it is too early to see how successful the legislation would be in improving position of consumers. Questions remain whether in practice the Consumer Arbitration Act fulfils its purpose, since the very purpose of arbitration itself is its speed and simplicity. What is certain is that consumer rights in the arbitration proceedings have been considerably strengthened and should ensure that suppliers, when concluding the arbitration agreements, have to comply with all formalities required by law. Ultimately, the new legislation can contribute to fast and smooth decisions in respect to consumer disputes without the need for intervention by the state courts.

On the other hand, it has to be emphasized that nothing is only black or white and traders in the context of the Slovak Republic have to tackle their own challenges. Their position was described by *Bělohlávek* as *"sometimes the position of "hostages", who are not able to protect themselves due to some*

abuse of broad rights to consumers". It is therefore very important to find balance between rights and obligations of both parties despite need to protect the one which is weaker and prevent any frivolous and vexations claims feared by some business sectors.

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