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# ARBITRATION PROCEEDINGS IN CONSUMER DISPUTES - SELECTED ASPECTS

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## **ABSTRACT**

This article deals with protection of consumer rights in the Slovak Republic, focusing on admissibility of arbitration clauses in consumer contracts. In consumer disputes, arbitration clauses present a specific practical and theoretical problem and therefore we examine this topic in wider discussion. In relation to arbitration clauses, jurisdiction of arbitration court in consumer protection is further discussed.

## **KEY WORDS:**

*arbitration, arbitration proceedings, arbitration court, consumer rights, consumer disputes, consumer contracts, consumer protection*

## **INTRODUCTION**

Traditionally, arbitration proceedings are considered to be an alternative to judicial proceedings, whereas they are characterized on the one hand by willingness to submit such proceedings, and, on the other hand, by securing the effects of arbitration proceedings by public authority.<sup>1</sup> According to certain opinions, however, it is an alternative which is apparently older than civil-judicial proceedings. Its benefits are fully reflected in particular in settling disputes arising in international trade where ignorance of business customs that can coact in the regulation of the relevant relation and the link of judicial proceedings to national law may slow down the whole decision-making process, and thus finally complicate the mutual cooperation of parties.<sup>2</sup>

However, the field of consumer contracts is specific in that one of the contracting parties is the consumer who is understood in many legal

regulations as the weaker party, whereas consequently this concept gives reasons for the necessity of protecting the consumer as the weaker party. Consumer protection has become one of priority goals on the EU level and the single internal market requires that no disturbance of economic competition occurs between sellers and service providers.

### **ADMISSIBILITY OF ARBITRATION CLAUSES IN CONSUMER CONTRACTS**

In the field of settling consumer disputes, arbitration clauses present a specific practical and theoretical issue, or arbitration proceedings in general. Arbitration proceedings present a voluntary form of settling disputes, which is based solely and exclusively on a bilateral agreement of the parties that they will refer their dispute for procedure and decision of a body other than the court, but for consumer contracts this type of participation in creating the content of contract slightly disappears. Act No. 150/2004 Coll. amending and supplementing Act No. 40/1964 Coll. the Civil Code, as amended, incorporated the concept of consumer contracts into our legal regulations. By incorporating this concept into our legal regulations, the requirements of uniform regulations for consumer rights on the European level were met, whereby the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts was transposed. Article 3 of the Directive contains the definition of unfair term, which is understood as “a contractual term which has not been individually negotiated 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. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”<sup>3</sup>

Slovak specialized literature has published also opinions which categorically rejected the validity of any arbitration clauses in consumer contracts. The author of this opinion argues that any arbitration clauses negotiated in consumer contracts are “void” as they are “unacceptable terms according to Article 53 of the Civil Code and according to a definition in Annex of the Council Directive No. 93/13/EC of 5. 4. 1993 on unfair terms in consumer contracts“. The author refers to letter (q) of Annex 1 of the cited Directive, which in his opinion categorically prohibits any arbitration clauses in consumer contracts.<sup>4</sup>

However, we do not consider the opinion as appropriate because the unacceptable term is defined in the consumer contract generally as a “provision, which causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer”<sup>45</sup>. This definition sets the basic characteristics of unacceptable term. However, the prohibition only applies to provisions accomplishing the criteria of the definition of unacceptable terms, which were not individually negotiated between the consumer and the supplier<sup>6</sup>, whereas in the issue of individual negotiation the burden of proof is placed fully on the supplier. The definition of unacceptable term laid down in Article 53 par. 1 of the Civil Code is a significant interpretation rule in the context of which it is necessary to construe also specific examples of unacceptable terms, which are specified demonstratively in Article 53 par. 4 of the Civil Code. The purpose of the prohibition of unacceptable terms in consumer contracts, in our opinion, cannot be an absolute elimination of contractual freedom, but only the prohibition of such provisions, which cause a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.

Therefore an arbitration clause which gives an opportunity to the consumer to decide each time before bringing an action against the supplier whether to bring it in the general or arbitration court, will not be in contradiction to Article 53 par. 1 the Civil Code as such an arbitration clause will be either:

1. **Balanced** – if the above opportunity to decide is provided to each of the contracting parties; or
2. **Imbalanced to the benefit of the consumer** - if the opportunity to decide is provided only to the consumer.

In both of the given cases it cannot be the contradiction to Article 53 par. 1 of the Civil Code as it prohibits only such arbitration clauses which are imbalanced to the detriment of the consumer. Despite of it, however, there can be a risk that the court in individual case will decide on the invalidity of arbitration clause in a consumer contract. In the specific case, however, the court should come to the conclusion in the relevant decision that such an arbitration clause causes a considerable imbalance in the parties’ rights and obligations to the detriment of the consumer, and that such an arbitration clause was not individually negotiated between the parties. However, if the arbitration clause is non-exclusive (whether for both par-

ties or only for the consumer), the court should not come to such a decision.<sup>7</sup>

Furthermore, equally in our opinion, it is evident from the provision of the Council Directive No. 93/13/EC of 5. 4. 1993 on unfair terms in consumer contracts that its purpose is not to prohibit arbitration clauses in consumer contracts “en bloc“, but it only prohibits such provisions which force the consumer to seek their claims against the supplier exclusively in arbitration not regulated by legal regulations. In this context it is necessary to stress the importance of the following terms laid down in the Directive:

1. **“to take disputes to“**, which clearly indicates that it should be cases where the consumer has actively proved his/her identity as the terms “to take disputes to“ clearly means to “bring an action (a motion to initiate proceedings)“;
2. **“exclusively to arbitration“**, which means that only such provisions are inadmissible following which the consumer may bring an action against the supplier exclusively in arbitration. Thus by applying the interpretation rule of “a contrario“ such provisions are admissible, which provide a choice to the consumer regarding whether to take disputes against the supplier to an arbitration or general court; and
3. **“not covered by legal provisions“**, the meaning of which is not clearly explained even in preparatory legislative documents of the Directive.

Therefore with respect to the cited provision of the Directive it is incorrect to declare null and void on its basis each arbitration clause in the consumer contract. The Directive imposes the duty on the member states to adopt such legal regulations following which only such arbitration clause will be invalid, which forces the consumer to take the supplier exclusively to arbitration. Thus if the consumer contract contains an arbitration clause which gives an opportunity to the consumer to decide whether to take the supplier to the general or arbitration court, such an arbitration clause will not be in contradiction to letter (q) of Annex 1 of the Directive or to the provision of Article 53 par. 4 r) of the Civil Code the text of which is very similar to the Directive.

Pursuant to Art. 6 par. 1 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts “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.“ An example of inappropriate clauses which can appear in consumer contracts with respect to arbitration proceedings is given in Annex 3 par. letter q of the Directive. Here inappropriate terms means the ones which “cause deprivation of 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.”<sup>48</sup> The said enumeration is, however, only a demonstrative instruction and the national court may not be limited by it in its interpretation of provisions regarding consumer protection within arbitration proceedings. What is important for them is the assessment of the adequacy of arbitration clause regardless of that some of the terms given in Annex 3 of the Directive was met.

Also in the judgments of the European Court of Human Rights in this context it has been observed that in national rule of law of member states there is often the waiver of right to examine its matter by the court in civil cases, namely in the form of contractual arbitration clauses. Since such a waiver is without doubt advantageous both for the parties concerned and for the administration of justice, in principle it is not in contradiction to the Convention... “Nevertheless, in a democratic society too great an importance attaches to the “right to a court” for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (*ordre public*) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review... Absence of constraint is at all events one of the conditions to be satisfied.”<sup>49</sup>

## **JURISDICTION OF ARBITRATION COURT IN CONSUMER PROTECTION**

Act No. 244/2002 Coll. on arbitration proceedings (hereinafter: “Act on Arbitration Proceedings”) excluded certain types of disputes from the jurisdiction of arbitration courts, whereas the disputes of entrepreneurs with consumers are not among them. Among the types of disputes that can be the subject of procedure before arbitration courts the Act defined such

proceedings which can be challenged by the participant in arbitration proceedings by action in the general court (Article 40 of Act on Arbitration Proceedings). This category of arbitration court judgments also includes actions for consumer rights as pursuant to the provision of Article 40 par. 1 j) of Act on Arbitration Proceedings: “A participant in arbitration proceedings may seek in action taken in the competent court the cancellation of national arbitration award only if in the decision-making generally binding legal regulations for consumer rights protection have been violated“.

The interest in establishing arbitration disputes consists in the unity of public interest and of private interest. Private interest in the presence of arbitration courts is based on the requirement of private law entities - entrepreneurs wish to have their business-related disputes decided on quickly, and not to limit their further business. Simplification, however, could limit the private interest in the presence of arbitration courts to the requirement of early settlement of disputes. Private interest also contains other elements where one of them is the interest of entrepreneurs to cooperate in the long term with the counterparty in dispute, whereas a long lasting dispute would disturb such cooperation. Potentially there is an interest of participants in the dispute to maintain secrecy with respect to information on the origination of mutual dispute and the method of its settlement. From the perspective of public interest we can specify as a classification criterion for the origination of jurisdiction of arbitration court the fact that for a dispute allocated into the decision-making authority of arbitration court no public interest exists to terminate the relevant dispute before a state body, and in dispute of such nature it is advantageous for the state to unburden state bodies (courts) from a part of disputes originating in society.<sup>10</sup>

In consumer matters, undoubtedly the issue of public interest is important. For consumer disputes exists a public interest in publishing the result of dispute, whereas the Civil Procedure Code (CPC) and the Business Code recognises to the consumer as a participant in legal proceedings the right to publish the judgment at the expense of participant who failed in the proceedings.<sup>11</sup> Publication of court judgment in consumer matters serves in particular for the information of the public on activity detrimental to a consumer, and simultaneously gives an opportunity to the consumer not to tolerate activity being detrimental to them by an entrepreneur of whom the court has found out that causes harm to the consumer, and not to tolerate activity being detrimental to them regardless of the method of



harm applied by the entrepreneur. However, neither the arbitrator nor the arbitration court has the power to apply appropriately Article 155 par. 3 CPC to order the publication of arbitration decision. Equally, the exercise of right pursuant to Article 55 par. 2 of the Business Code in consumer matters is excluded not only on this but also on another legal grounds, as Article 51 par. 1 of Act on Arbitration Proceedings does not allow subsidiary application of the Business Code as a source of law, albeit a legal entity authorised to protect the consumers interests can be the petitioner in the cases of unfair competition being detrimental to consumers (Article 54 par. 1 of the Business Code).

In the matters of consumer protection concurrently exists also another public interest, i.e. an interest in the removal of inadmissible terms from consumer contracts. For such purpose pursuant to Article 153 par. 3 CPC, the court may state in a judgment related to a dispute under a consumer contract even without a motion that a certain term applied in consumer contracts by the supplier is inadmissible. The Court may seek that the breaching party refrain from unlawful conduct and that it remove the unlawful state of affairs, and also award to the consumer the right to adequate compensation pursuant to Article 3 par. 5 of Act No. 250/2007 Coll. on Consumer Protection. The court may determine an invalid inadmissible term in a consumer contract and specify also other legal effects against consumer conduct pursuant to Article 53a par. 1 of the Civil Code.

All of this cannot be determined by the judgment of an arbitrator or arbitration court. The result is that the hearing of consumer rights in arbitration proceedings is capable of affecting a small part of prospective illegal conduct and a considerable part of consumer rights remains open even after judgment of arbitration court for proceedings before a general court. As a result of this arises a question on the sense of settling consumer disputes by arbitration court. A regular effect of such proceedings can be in particular the avoidance of enforceability of consumer protection, being in general a result that is unilaterally advantageous to the entrepreneur. According to the current legal regulations, decision-making on consumer disputes by arbitration courts may serve easily for the circumvention of the legal regulations in force that serve for consumer protection.<sup>12</sup>

Even though the Civil Code provides protection of consumer against unilateral constrain to arbitration proceedings, several provisions of the law on arbitration proceedings for consumer disputes seem to be unsustainable in practice. It is in particular the delivery of arbitration awards

without hearing and the delivery of documents by sending to the last known address of the consumer, although they are not taken over. Such attributes cause disadvantages to the consumer, and therefore, in the interest of more effective protection of the weaker party it will be necessary to re-assess the relevant provisions of Act on Arbitration Proceedings.<sup>13</sup>

The resolution of consumer disputes through arbitration proceedings and other methods of alternative dispute resolution is especially important in the European context. On the European level, several documents have been adopted, which recommended preferring the system of alternative dispute resolution to resolution through national courts. This direction started in the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and in the Commission Recommendation 310/2001/EC of 4 April 2001 on the principles of alternative resolution of consumer disputes.<sup>14</sup>

## CONCLUSION

Arbitration courts do not belong to the system of judicial power, but they can be institutionalized means of its protection against excessive burden. Decision on disputes by arbitration courts, however, cannot hinder an access to court for such disputes which the judicial power is to decide on within the limits of fundamental right to judicial protection (Art. 46 par. 1 of the Constitution of the SR) or right to a fair hearing (Art. 6 par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Arbitration court is a body which based on the manifestation of will of equal parties to a dispute judges the dispute and gives a ruling on it. In such areas as consumer protection where special legal regulations exist for equalization of the real position of consumer as one party to a dispute and an entrepreneur as the other party to a dispute often no equal position of entities can be present. Therefore consumer law is specific and characterized by the prevalence of peremptory rules, whereby it presents a certain difference from the general concept of private law, which is based on the principle of contractual autonomy. Consumer law modifies this principle for the purpose of higher protection of the weaker party of consumer contractual relation, being right the consumer.<sup>15</sup>

As for the arbitration clause (negotiated before the occurrence of dis-

pute), which is non-exclusive at least for the consumer (i.e. gives an opportunity to the consumer to decide each time before bringing an action against the supplier whether to bring it in the general or arbitration court), it will be fully valid and applicable also in consumer disputes. Equally, such an arbitration clause will be valid, which enables any party to make the relevant decision (i.e. it will be non-exclusive to the benefit of the consumer and the supplier) as such an arbitration clause will not impair the consumer's position in comparison with the case given in the preceding sentence. This conclusion resulted from a grammatical and logical interpretation of law, analysis of the EU legislation and ECJ judicial decisions. Since there are, however, also opinions towards total prohibition of arbitration clauses in consumer contracts, we raise our opinion as an impulse for prospective discussion, and not as a categorical and irreversible conclusion.

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