

ARBITRABILITY LIMITATION IN CONSUMER (B2C) DISPUTES? : CONSUMERS' PROTECTION AS LEGAL AND ECONOMIC PHENOMENON

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Abstract

Protection of consumers became a phenomenon of many governmental politics. Retrieval of a balance between private autonomy and protection of a weaker party is very sensitive. The particular degree of consumers protection through limitation of contractual autonomy (in B2C contracts) as well as procedural autonomy (regarding B2C dispute resolution mechanisms), as chosen by particular governments, has both legal and economic effects, in positive and negative sense. The European Court of Human Rights adjudicated repeatedly that traditional court litigation is not capable to grant effective protection to contractual claims in many countries. Arbitration is therefore one of possible tools for B2C dispute resolution, even if many countries and obviously the EU Commission follow rather an opposite strategy (keeping down arbitrability of B2C disputes in the opposite to US trends). Arbitration is not a cure-all and definitely not a method suitable for the resolution of any and all types of disputes. It has its proponents as well as opponents. Indeed, it is hard to claim that a particular type (class) of disputes is a priori fit to be resolved in arbitration, rather than litigation, or vice versa. This also applies to consumer disputes (disputes from consumer contracts). It is fairly undisputable that consumers deserve a certain degree of specific protection in cases in which they are forced to enter into a particular contract and have no other option than to accept the conditions stipulated by the other party (the professional). But we cannot principally claim that the resolution of these disputes in court would be more suitable than arbitration or any other, the so-called alternative, dispute resolution method (ADR).

Despite the basically undisputed importance of and the need for special consumer protection (whether provided by special laws, typically in Europe, or on the basis of general legal principles and the application of general contract law, like in the USA), the degree of such protection can be considered as somewhat controversial. The weaker party does deserve special protection within the regime of the equal status of the contracting parties. But the intensification of this protection often results in the possibility of the consumer to abuse this standard; abuse of the consumer's right should naturally no longer enjoy any protection. Typically, consumers have grown accustomed to the practice of exercising their right to rescind (cancel) the contract by the statutory deadline while, in the meantime, they actively use the goods and thereby fulfill the purpose of the purchase (this specifically applies to seasonal goods). 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.

Keywords: Arbitration, Arbitrability, Arbitrator, Abuse Of Rights, ADR, Autonomy, B2C Disputes, Class Actions, Consumer, Constitutional Principle, Contracts, Denial Of Justice, Duration Of Proceedings, European Convention Of Human Rights, European Court Of Human Rights, Enforcement Of Arbitral Awards, EU Law, Fair Trial, Expediency Of Proceedings, Human Rights, Judicial Protection, Litigation, Minimization Of Costs, Ordinary Consumer, Ordre Public, Party To Arbitration, Professionals, Public Interest, Public Policy, Recognition Of Arbitral Awards, Weaker Party

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1.1. Different national approaches and experience in the resolution of consumer (B2C disputes)

Many governments do declare protection of consumer as subject to public interest using differential approaches for this task.¹² Arbitration is usually classified as one of several alternative dispute resolution methods (ADR),¹³ i.e. different from court litigation. The other alternatives, apart from arbitration, include for instance mediation or mediation connected with arbitration, expert proceedings,¹⁴ assisted conciliation and procedures which could be labeled as arbitration but lack some of its features, such as voluntariness, the right to appoint arbitrator etc. To name just a few: on-line dispute resolution similar to mediation as well as government-promoted consumer dispute resolution regimes, for instance in Spain [ESP] or Portugal [PRT]. The United Kingdom [GBR] has adopted a specific consumer dispute resolution system according to which all disputes from consumer credits are obligatorily resolved by the Financial Ombudsman in compliance with the Consumer Credit Act [GBR] (1974).¹⁵ The formal aspects of these

¹² Unfortunately, the governments usually do not differentiate between "public interest" and "public policy", while "public policy" may entitle the governments to limit the contractual as well as procedural autonomy. The author holds the view that protection of consumers may create subject to "public interest" and not subject to "public policy". Cf. for instance BĚLOHLÁVEK, A. (2012) "Public Policy and Public Interest in International Law and EU Law". In: BĚLOHLÁVEK, A. et ROZEHNALOVÁ, N. CYIL – Czech Yearbook of International Law, JurisPublishing, Huntington, N.Y. (US), Vol. 3, p. 117-148; MEREZHKO, O. (2012) "Public Policy (Ordre Public), Mandatory Norms and Evasion of Law in Ukrainian Private International Law." In: CYIL, Vol. 3, pp. 149-160; MRÁZEK, J. (2012) "Public Ordre (Ordre Public) and Norms of Jus Cogens." In: CYIL, 2011, Vol. 3, pp. 149-160; VIKTOROVA, N. (2012) Public Order in the Practice of Russian Courts. In: "CYIL", Vol. 3, pp. 101-116; BĚLOHLÁVEK, A. (2012) "Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?" In: BĚLOHLÁVEK, A. et ROZEHNALOVÁ, N. CYArb – Czech (& Central European) Yearbook of Arbitration, JurisNet LLC, Huntington, NY (US), Vol. 2, pp. 17-42.

¹³ Several passages will analyze the difference between common law and civil law; common law (as opposed to continental schools) classifies arbitration as one of the so-called ADR methods. Conversely, civil law is closer to the jurisdictional (but mostly hybrid) approach and it therefore separates arbitration from the ADR as a special method of finding the law and resolving disputes.

¹⁴ Cf. for instance BĚLOHLÁVEK, A. et HOTOVÁ, R. (2011) Znalci v mezinárodním prostředí (v soudním řízení civilním a trestním, v rozhodčím řízení a v investičních sporech). [Title in translation: Experts in the International Environment (in Civil and Criminal Court Proceedings, in Arbitration and in Investment Disputes)]. C. H. Beck, Prague, (the book particular is also available in Polish – Warsaw: C. H. Beck, 2011, in Russian – Kyiv: Taxon, 2011 and in Romanian – Bucharest: C. H. Beck, 2012).

¹⁵ Consumer Credit Act (1974), as amended in 2006 – Consumer Credit Act (2006). The current version of the Consumer Credit Act (1974) available at <http://www.legislation.gov.uk/ukpga/1974/39/contents#48593>

proceedings are significantly different from arbitration. The outcomes (of however authoritative decisions) of these procedures cannot be enforced in international relations even under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958).

1.2. Positive and negative aspects of litigation and arbitration in consumer disputes, fair trial and efficiency of dispute resolution

Arbitration is not a cure-all and definitely not a method suitable for the resolution of any and all types of disputes. It has its proponents as well as opponents. Indeed, it is hard to claim that a particular type (class) of disputes is *a priori* fit to be resolved in arbitration, rather than litigation, or vice versa. This also applies to consumer disputes (disputes from consumer contracts). It is fairly undisputable that consumers deserve a certain degree of specific protection in cases in which they are forced to enter into a particular contract and have no other option than to accept the conditions stipulated by the other party (the professional). But we cannot principally claim that the resolution of these disputes in court would be more suitable than arbitration or any other, the so-called alternative, dispute resolution method (ADR). The individual states, as well as the entire international community, realize with an ever increasing awareness that litigation is often unable to offer effective legal protection. Take for instance Germany [DEU]. The European Court of Human Rights (ECtHR) has repeatedly held that the unreasonable length and procedural complexity of judicial proceedings have breached the right to a fair trial in a number of countries. The usual culprit was Germany but similar complaints have been, on more than one occasion, filed against other countries too. Indeed, it was a series of complaints against Germany [DEU] which actually resulted in a resolution delivered by the Grand Chamber of the ECtHR which in *Sümerli v. Germany* [DEU],¹⁶ as a model case,

3 [last visit 14 January 2012]. Amendments implemented in 2006 are also analyzed at the website of the Office of Fair Trading at <http://www.offt.gov.uk/about-the-offt/legal-powers/legal/cca/CCA2006/> [last visit 14 January 2012].

¹⁶ Decision of the ECtHR, case no. 75.529/01 of 8 June 2006 (*Sümerli v. Germany*). Indeed, German constitutional law fully adheres to the principle of the right to a speedy trial before an independent and impartial tribunal; this right is even explicitly incorporated in the constitutions of some of the federal states (for instance Article 51(4) of the Brandenburg Constitution [DEU] etc.). Cf. for instance Council of Europe, Venice Commission. Can Excessive Length of Proceedings be Remedied? (Science and Technique of Democracy), 2007, p. 164. The last mentioned publication issued by the CoE contains a detailed analysis with national reports filed by the Member States of the ECHR. It is easy to see that most countries suffer from excessive length of proceedings, procedural obstacles and other problems with the enforcement of rights in courts. These excesses are often repeated and extreme; what is even worse, these problems occur more and more frequently

even ruled that the contemporary German procedural law does not safeguard effective instruments¹⁷ for the protection of rights enshrined in the European Convention on Human Rights (ECHR). The relationship between the factual and legal findings in *Sümerli v. Germany* [DEU] and other similar complaints filed with the ECtHR against various states is notoriously well-known in many countries (procedural complications and delays, repeated remanding of cases for a new trial in the lower court, delays in the drafting of expert appraisals and their discussion in court, which all contributed to the fact that a basically simple dispute took many years to settle). The promotion of arbitration and alternative dispute resolution (ADR)¹⁸ is therefore one of the logical solutions.¹⁹ On the other hand, it is a method of finding the law and resolving disputes which entails many risks. Despite the existing role of the court (support and supervision), the decisions are rendered by private-law entities, i.e. outside the absolute control exercised by public authorities. The potential risks are therefore obvious. However, the just protection of the weaker parties in contractual relationships is not the only criterion; it is also in the public interest that such protection be effective, efficient and expeditious. This publication focuses, inter alia, on these mutual contradictions from the perspective of consumer protection and arbitration. Naturally, it is not possible to analyze any and all

aspects. But the author is trying to define and examine a number of them.

1.3. Importance of consumer protection against the background of the dispute resolution mechanism

Despite the basically undisputed importance of and the need for special consumer protection (whether provided by special laws, typically in Europe, or on the basis of general legal principles and the application of general contract law, like in the USA), the degree of such protection can be considered as somewhat controversial. The weaker party does deserve special protection within the regime of the equal status of the contracting parties. But the intensification of this protection often results in the possibility of the consumer to abuse this standard; abuse of the consumer's right should naturally no longer enjoy any protection. Typically, consumers have grown accustomed to the practice of exercising their right to rescind (cancel) the contract by the statutory deadline while, in the meantime, they actively use the goods and thereby fulfill the purpose of the purchase (this specifically applies to seasonal goods). 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. For instance, our experience from the Czech Republic [CZE] shows that the overwhelming majority of consumer disputes are lawsuits filed by professionals against consumers for the consumers' unwillingness or inability to meet their financial obligations. Only a negligible number of cases are initiated by the consumers' petitions against professionals for defective performance (defective goods or services). It has transpired that a fairly slow litigation is not able to afford sufficient protection to professionals who often become a hostage to consumers. If the consumer fails to estimate properly his or her financial possibilities and fails to meet his or her financial obligations as a result thereof, then any special protection afforded to the consumer despite the fact that the consumer received any and all information at the conclusion of the contract would typically, in the author's opinion, constitute an abuse of right. In these cases, the absence of expeditious and efficient dispute resolution and the denial of an otherwise available and speedy means of finding the law with a guarantee of a fair trial contradict the principles of the rule of law and have the result of the law approving the abuse of rights by consumers who rely on the fact that litigation can very well last several years. On the other hand, it is hardly imaginable that litigation could waive some of its traditional and essential elements of civil procedure. Consequently, arbitration is in many states one of the suitable options of solving this situation, providing it is beyond any doubt that the agreement on arbitration

and the proceedings in developed countries with traditional democracy and a developed judicial system and infrastructure are taking longer and longer.

¹⁷ As concerns this issue, see an interesting article by HÁJEK, O. (2008) "Winning your case in good, effective remedy is better! Recognition of Foreign Judgments and Arbitral Awards in the Czech Republic." *Common Law Review*, No. 8.

¹⁸ It is necessary to emphasize that the conceptual approach to the ADR differs depending on the individual legal culture. While most jurisdictions based on common law principles classify arbitration among alternative dispute resolution methods (ADR), most civil law countries perceive arbitration as separate from the ADR. This highlights the fact that arbitration is an alternative to litigation, as concerns both the nature, and especially the outcome of the proceedings. Arbitral awards are mostly equaled with court judgments. This is not to say that the common law would not often arrive at the same conclusion. But the doctrinal reasons behind the solution are different. The reason is that the common law regime (depending on the individual country) is based on the presumption that even the judiciary (the exercise of judicial authority by courts as public authorities) has a contractual basis, similarly to the exercise of any other public authority. Conversely, most civil law countries are more inclined towards the assumption that the power exercised by public authorities is derived from state sovereignty as an immanent component of the "state", both under international law and from the perspective of national (domestic) law.

¹⁹ BĚLOHLÁVEK, A. (2011) "Arbitration from Perspective of Right to Legal Protection and Right to Court Proceedings (the Right to Have One's Case Dealt with by a Court): Significance of Autonomy and Scope of Right to Fair Trial." In: BĚLOHLÁVEK, A. et ROZEHNALOVÁ, N. *CYArb - Czech (& Central European) Yearbook of Arbitration: The Relationship Between Constitutional Values, Human Rights and Arbitration*, JurisNet LLC, Huntington, NY (US), Vol. 1, pp. 47-70, here p. 47-49.

is the outcome of the parties' genuine expression of will.

Besides, it is not to be applauded that the special consumer protection and mainly its intensity (for instance in the EU) focuses only on the elimination of the consequences, not the causes.²⁰ The reason is that the special protection concerns the invalidity of certain terms in consumer contracts. But no rules (let alone any mandatory rules) apply, for example, to banks which launch huge and well-designed advertising campaigns before summer holidays or usually before Christmas holidays accompanied with slogans such as "you can afford it with us". Nobody has imposed any obligation on the providers of consumer credits²¹ to present a specific warning to the consumers that they might not be able to meet their obligations, or even an obligation to perform a detailed analysis of the creditworthiness of the consumer to whom the loan or credit is extended, and an obligation to refuse to provide the consumer credit unless clearly defined criteria are met. Such a mechanism would probably help to solve the cause, thus eliminating the need to solve the consequences. The latter is often done in a somewhat forceful manner that necessarily interferes with the principles of protection of the civil-law autonomy. However, even those consumers who assume very risky obligations are afforded a high degree of protection. These circumstances should also be considered by the legislators before they lay down consumer protection rules, and frequently very rigorous ones, as well as by the forum when assessing the proportionality of application of special consumer protection to the detriment of the protection of contractual autonomy. It is basically undisputable that a consumer, when confronted with the vision of an expected and often *luxurious* performance, enters into any contract irrespective of the information provided to him or her by the professional and irrespective of the form of such information (in a separate / separately signed documents, with certain terms visually highlighted etc.). Besides, the volume of information which must be provided to the consumer often exceeds the quantity that an *ordinary consumer* is able to process, and especially realize the actual basis of such information. Any solution which only increases the volume of mandatory information provided to the consumer or any solution consisting in a crusade against any and all methods of an alternative exercise

of rights by the professional is more of a political excuse which – as the author has already noted above – does not solve the cause but attempts, in a somewhat populist manner, to solve the consequences. Such a solution, unfortunately and by no means accidentally, resembles the solutions often adopted by the authorities in the past, i.e. popular but useless measures such as a general postponement of the due date of debts in crises (for instance the postponement of the maturity of bills of exchange and promissory notes during the Paris Commune or, even earlier in history, the pogroms targeted at groups of persons extending credits accruing a higher interest). The attempts to maximize measures at a stage which requires the exercise of rights in an authoritative manner arising from a contract concluded by the consumer are, in the author's opinion, just as unsuitable as an attempt to have a naughty child *finally touch the hot oven* and experience the painful consequences of his or her thoughtlessness. Indeed, such approach could also be applied to the broad area of other civil-law relationships. It is not unlike such well-known axioms as: the bankers most skilled in the evaluation of credit risks are those businessmen who have experienced their own bankruptcy at least once etc. The author does not claim that arbitration is a *cure-all*. Although he has long been voicing his support for alternative dispute resolution, primarily arbitration, the author maintains that arbitration is generally suitable only for a rather small class of civil disputes and it is always necessary to insist on a maximum level of expertise of arbitration which, thanks to the quality of the decision making in the merits and the possibility to influence the composition of the *arbitral forum* by the parties, would represent the counterpole of the procedural deviations of such proceedings (arbitration) from litigation. Arbitration *can* be one of the methods which facilitate a proportional satisfaction of the protected interests even in consumer disputes, but on one condition – that the arbitration in such cases guarantees a high standard and safeguards its inherent principles which cannot be waived in any contradictory proceedings.

1.4. Risk of abuse of the special protection by the consumer

Our experience shows that a certain regime of protection for the *weaker party* is indispensable; but this *weaker party* often abuses these standards. National legal systems ought to find protective mechanisms to prevent such unfair practices by the consumers. In the EU Member States, the individual countries should employ their procedural autonomy to the fullest extent.

We could refer to many examples of how the consumers have managed to find ways to abuse the special protection afforded to them. Under the special regime introduced by the EU, it is by no means an

²⁰ In the EU law, Directive 2008/48/EC which repeals the preceding rules incorporated in Directive 87/102/EEC regarding consumer credits, stipulates in Article 20 that "Member States shall ensure that creditors are supervised by a body or authority independent from financial institutions, or regulated." But the scope of such supervision is defined in very loose terms. As concerns unfair practices adopted by the providers of consumer credits in advertising, supervision in the individual states is exercised only very randomly.

²¹ Concerning the issue of consumer credits and arbitration, see for instance NOVÝ, Z. (2010) Spotřebitelské úvěry a rozhodčí řízení. [Title in translation: Consumer Credits and Arbitration]. Jurisprudence [CZE], No. 8, p. 22 et seq. et al.

exception today that the consumer intentionally avails himself or herself of the defense of invalidity of the arbitration clause and reserves the possibility of such arguments for the proceedings on annulment of the arbitral award, should his or her arguments in the merits fail. The fact that this or any other abuse of the respective protection is not the purpose of the EU law (or of the national regimes outside the EU) is hardly ever mentioned, let alone in any erudite manner. The author believes that the national regimes (perhaps within their procedural autonomy) must find a way to prevent such situations.²² Besides, even the ECJ ruled in the *Asturcom* case that **certain limitations comply with the Community law (EU law)**. In other words, the courts may substitute for the consumer's omission to plead unfairness of the arbitration clause in arbitration, but only to a certain extent. They may not substitute for an entirely passive consumer, such as a consumer who fails to take part in the arbitral proceedings in any manner and, on top of that, fails to sue for annulment of the arbitral award.²³ The author opines that this list must be perceived only as an indicative list, mainly if the specification of the rules and, especially, all the procedural rules are within the autonomous legislative competence of the EU Member States. Nonetheless, this conclusion alone cannot serve as the basis for the concept of a balanced procedural status (considering all specifics of the consumer contractual relationship). The complete passivity of the consumer in arbitration is not the only problem; the issue also encompasses situations in which the consumer intentionally does not plead invalidity of the arbitration clause. Besides, an omission to claim the clause in arbitration and a failure to sue for annulment of the arbitral award are, procedurally, two different categories.

2. Scope of the consumer protection issues

2.1. Weaker contracting party and average consumer

The vulnerability of consumers is the result of their relationships with professionals who have a strong negotiating position and broader access to information. The conclusion of a contract with a consumer is an ordinary task for the professional performed in the course of his or her business repeatedly and regularly. It is justified to presume that the professional can manage the task better than the

consumer with little experience and, frequently, limited possibilities of active and efficient legal support. It is often highlighted, and this is particularly significant in the context of arbitration, that the consumer often has only a limited possibility of implementing any changes in the business terms and conditions. The circumstances attending the conclusion of consumer contracts are also frequently characterized by the somewhat laconic but nonetheless very fitting "take it or leave it".²⁴ On the other hand, and this is probably fundamental even in proceedings regarding consumer contracts, it is always necessary to estimate properly the limits of this protection which ought to be (simply speaking) a protection within the standard afforded to the so-called **average consumer**.²⁵ The reason is that although consumer protection is regarded as one of the crucial perspectives even in the EU legislation, it is not acceptable to impose all the risks of the contractual relationship on the professional and de facto absolve the consumer of all responsibility. Such approach would constitute an abuse of rights and conflict with the fundamental principles of a law-abiding society. These principles require, inter alia, that each individual assume an adequate measure of responsibility for his or her own legally binding acts. Principally this entails an estimate of the degree of knowledge, skills and possibilities of the average or, let's say, common consumer²⁶ and application thereof to the specific factual and legal situation and ultimately to the individual dispute and the resolution thereof. Indeed, even the EU standards do not go so

²⁴ See also below, the footnote regarding the so-called adhesion contracts.

²⁵ See also para. (18) of the Preamble to Directive 2005/29/EC according to which the degree of prudence possessed by today's so-called average consumer must be subject to a stricter test than before (not only cursory or perfunctory diligence but a reasonable degree of circumspection and carefulness). For an analogous example see also, for instance, the Supreme Court (CZ) judgment, case no. 32 Cdo 4661/2007 of 23 October 2008, available online at <http://www.nsoud.cz/rozhod.php?action=read&id=45311&searchstr=32+Cdo+4661%2F2007> [last visit 24 May 2009]. Concerning the term "average consumer" see also judgment of the SC CR [CZE], case no. 23 Cdo 1201/2009 of 29 June 2010.

²⁶ Concerning said issue see also, for instance, the judgment of the SC CR [CZE], case no. 32 Odo 229/2006 of 30 May 2007, which reads as follows (cit.): (1) The criterion of "average consumer" is based on a sufficiently informed consumer who is reasonably circumspect and diligent, considering the social, cultural and linguistic factors. (2) Almost every consumer expects that advertisements promoting goods or services of daily consumption necessarily entail a certain degree of exaggeration and hyperbole which the consumer does not believe. Adopted from an annotation in: ONDREJOVÁ, D. Generální klauzule nekalé soutěže v aktuální rozhodovací praxi Nejvyššího soudu ČR. [Title in translation: The General Unfair Competition Clause in the Contemporary Case Law of the Supreme Court of the Czech Republic]. *Soudní rozhledy*, 2009, Vol. 15, No. 4, pp. 121–126, here p. 126. The judgment is also available online at <http://www.nsoud.cz/rozhod.php?action=read&id=36076&searchstr=32+Odo+229%2F2006> [last visit 23 May 2009].

²² For a more specific analysis and an idea of the possible concept of such measures, see below in a detailed annotation of the ECJ judgment C-168/05 of 26 October 2006 in *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*.

²³ ECJ Judgment, Case C-40/08 of 6 October 2009 in *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira (Asturcom)*, published in: ECR 2009, p. I–09579. CELEX 62008CA0040. A separate detailed annotation of this ECJ judgment is provided elsewhere in this publication.

far as to afford absolute protection to the consumer who fails to protect his or her interests or, indeed, abuses the consumer protection laws.²⁷

A typical example of a situation in which the safeguarding of a reasonable special protection to the consumer is justified and desirable are the **adhesion contracts**, i.e. contracts with respect to which **the consumer may either accept or decline the offer as a whole**, he or she can hardly influence the contents of the offer by any negotiation and modify the offer on the basis of the process of establishing the contractual consensus of the parties. If a particular consumer enters into legal transactions with bigger professional entities, modifications (changes) of the contract or of the general terms and conditions compared to the standard forms used by the professional are often out of the question. Consequently, professionals find themselves able to exert substantial pressure and introduce provisions in their contracts which put them at a major advantage. Combined with the consumer's lack of information, this situation results in significantly imbalanced contracts.

In the international arena, i.e. in an environment crossing state borders (i.e. in relationships with an international dimension), this problem is even multiplied. Consumer contracts used to be mostly national. Consumers were expected to leave their domestic environment and the exclusive jurisdiction of [their] national law substantially less frequently than professionals. Consequently, the resolution of any conflicts which have arisen has traditionally been the domain of national laws (laws of national origin). Even tourists who enter into consumer contracts outside their home country cannot be distinguished from domestic consumers (simply because they are not entering into the contract "from" another country). The recent unusual expansion of private-law relationships with the so-called international or transnational, cross-border, dimension at the European level has been, naturally, strongly influenced by the migration in the single (free) market. The application of the fundamental freedoms of the single market means that any legal relationship, and primarily any contractual relationship, must be basically *a priori* viewed from the perspective of the [potential] existence of a specific international dimension.²⁸ This dimension can significantly

influence the legal (conflict-of-laws) status of the relationship. In that connection, we focus primarily on the governing (applicable) substantive law, including the applicable mechanisms employed to protect and enforce rights. Consequently, it comes as no surprise that this particular issue has attracted exceptional attention in the EU in the form of a fairly extensive and wide-reaching harmonizing legislation.

On top of that, active electronic communication has significantly facilitated and helped to expand the practice of concluding consumer contracts between parties from different countries. Nonetheless, the presumption is that when dealing with professionals outside their home country, consumers are even less acquainted with the potentially applicable laws of another country. The same, however, holds true for certain groups of professionals. It especially applies to small enterprises which may be capable of doing business with the use of electronic media but they are presumed to have more limited knowledge with respect to the consumer legislation in the markets of those countries where they succeed thanks to their electronic communication.

2.2. Claims made in consumer disputes

These and many other specific considerations influence the consumer legislation at the national as well as the international level. National consumer protection laws in turn influence the resolution of disputes to which the consumer is a party. Nonetheless, **litigation involving consumer claims** (litigation in B2C disputes) **exhibits**, despite the existence of many national specifics, **a number of common features**. For instance: (i) The quantification of consumer claims indicates that such claims are often small (petty), frequently almost negligible.²⁹ (ii) It is unlikely that consumers could afford extensive and often very demanding, i.e. expensive, legal consultancy or pay high court fees, albeit only in the form of down payments. This contrasts with the fact that most legal systems (at least in consumer disputes) broadly apply the principle which stipulates that the obligation to pay the costs of proceedings is imposed on the parties depending on their success in the dispute. We could similarly analyze many other typical features exhibited by the so-called consumer disputes in various proceedings. In consequence thereof, disputes with consumers are characteristic for the **disproportion between the contested economic**

²⁷ These conclusions can be reached, for instance, on the basis of the following rulings:

the ECJ judgment in Pannon GSM which is annotated in detail in the excursus into EU law, the ECJ's case law; judgment of the Madrid Appeals Court [ESP], case no. 28079370102010100498 of 12 November 2010 (Juan Pedro v. Metrovacesa S.A.). Moreover, these rulings and other circumstances indicate that the violation of consumer protection rules in the conclusion of arbitration agreements does not have the consequences referred to in some legal systems as "absolute invalidity" (for instance [CZE], [AUT] et al.), "ineffectiveness" (for instance [DEU]) etc.

²⁸ Cf. for instance BĚLOHLÁVEK, A. (2006) "Význam mezinárodního prvku v závazkových vztazích. [Title in

translation: Significance of the International Dimension in Obligations]." Právník [The Lawyer], Institute of State and Law, Academy of Science of the Czech Republic, Prague [CZE], Vol. 145, No. 5, pp. 568–578 et al.

²⁹ See FAVRE-BULLE, X. (2006) « Arbitrage et Règlement alternatif des litiges (ADR): une autre justice pour les consommateurs? » In: THEOVENOZ, L. et REICH, N. (eds.) Droit de la consommation, Liber Amicorum Bernd Stauder, Schulthess, Genève, p. 97 et seq., here p. 182 and IA. European Citizens and Access to Justice, Eurobarometer special 195/ edition 60.0, October 2004.

value and the costs of its settlement in court.³⁰ It is therefore unlikely that consumers would sue if the anticipated costs compared to the likely outcome was not in their favor or if the financing of such costs, albeit only in the form of down payments, placed an unreasonable or even an unbearable burden on the consumers. This could ultimately result in the *denial of justice in consumers' claims*.

2.3. Resolution of consumer issues

Due to the significant number of consumers – more than 360 million only in the EU³¹ – and the associated political influence – the legal systems of many countries have recently devoted more attention and more space to consumer disputes. The purpose of the corresponding special regulation is to safeguard an effective goods and services market for the consumer. Apart from that, the special regulation is also supposed to perform functions beneficial for the professionals doing business in the consumers' markets despite the fact that in certain situations the professionals will have to waive the opportunity to apply their negotiating power to the full extent.

The basis of the consumer legislation (consumer protection rules) can be summarized by the following quotation (in translation) “[...] *between the strong and the poor [...] freedom limits and law liberates*”.³² Consumer legislation attempts to balance the unequal relationship.

The extent to which the ability and the legal potential of the professionals to apply their negotiating power can be restricted is very diverse in the international environment, especially in the non-harmonized area (as opposed to, for instance, the EU single market). For instance, whereas the American law is more concentrated on the freedom of the parties to commercial transactions to resolve their disputes in compliance with their needs, European law attempts to protect the party to the transaction that it considers weaker. Simply speaking (and this is perhaps the most misleading aspect), the American approach subordinates the protection of the weaker party to the concept and the principle of greater autonomy of will, whereas the European approach prefers to limit this autonomy by the public interest in consumer protection which could be, in certain countries, perceived as part of public policy.³³

There are principally two basic models of specific solutions to consumer disputes. The first model allows the consumers to organize in associations aimed at the collective protection of their interests and at attaining a certain critical number, which will give them the opportunity to enforce their rights under standard conditions with a reasonable ratio between the costs and the results of a dispute. In consequence thereof, the association of a greater number of consumers will result in a certain equilibrium among the interest in legal protection, the actual possibilities of enforcing their rights and the costs of exercising their rights by legal means. Many legal systems call such procedure **class action**.

The second model of resolution of consumer disputes focuses on the establishment of special fora (special mechanisms) for dispute resolution. The proceedings are from the very beginning intended to minimize the costs of the proceedings and to employ simple procedures.³⁴ For example, many legal systems have courts for minor claims which are inexpensive and easily accessible. Similar mechanisms and procedural instruments are often employed as a special method of resolution of consumer disputes. Some of these legal systems have introduced corresponding judicial (procedural) mechanisms with simplified procedures, others use various forms of out-of-court dispute resolution, including both arbitration, which is principally an authoritative process of finding the law, and other forms of dispute resolution (the so-called ADR). Lawyers as legal counsel for the parties are usually unnecessary; in certain countries, the applicable laws even prescribe that a verbal pronouncement of the decision suffices and drafting detailed judgments or awards is not necessary because the final order and a brief reasoning are usually recorded in the simplified minutes from the hearing of the case. This method of dispute resolution is not always successful. In Switzerland [CHE] for instance, the federal laws stipulate that the individual cantons are obliged to secure mechanisms for the resolution of minor (small) claims but the results are described as very negative.³⁵ Conversely, the system of institutional resolution of consumer disputes in Spain [ESP] or Portugal [PRT] is considered successful.

The selected method then determines whether arbitration is perceived as a problem or, conversely, as a suitable, or alternative, solution. The crucial problem which is frequently (albeit not always competently) voiced in the media is that the commentators – whether the proponents or the opponents of this or that solution – usually defend

³⁰ Commission [EC] Recommendation 98/257/EC of 30 March 1998, OJ L 115, 17 April 1998, pp. 31–34.

³¹ RUTHERFORD, M. (1998) “Documents-Only Arbitration in Consumer Disputes.” In: BERNSTEINA, R. et al. Handbook of Arbitration Practice, London, 1998, marg. 8-06.

³² The original wording (cit.): „Entre le fort et le faible [...] c'est la liberté qui opprime et la loi qui affranchit.” Lacordaire, R., P., H. -D. 52ème Conférence de Notre-Dame. Œuvres, Vol. IV, p. 494.

³³ DRAHOZAL, C. et FRIEL, R. (2005) « A Comparative View of Consumer Arbitration. Arbitration », 2005, Vol. 2, p. 135. Concerning the issues of public policy and public interest (especially from the EU law perspective), see a separate chapter above.

³⁴ This is advocated for instance by the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (the so-called E-commerce), 2000, pp. 18–19.

³⁵ FAVRE-BULLE, X. (2006) Arbitrage et Règlement alternatif des litiges (ADR): une autre justice pour les consommateurs? In: THEOVENOZ, L. et REICH, N. (eds.) Droit de la consommation, Liber Amicorum Bernd Stauder, Schulthess, Genève, 2006, p. 97 et seq., here p. 98.

one or the other of the contravening standpoints and hardly ever attempt to, or are able to, find a sober opinion and a neutral assessment. Practical experience of the individual countries is diverse and the resolution of consumer disputes is precisely the department where any simplistic conclusions are more than harmful and often ultimately detrimental to one or the other form of resolution of consumer disputes, as well as to both groups of the parties to the legal (contractual) relationships of a consumer type. Unfortunately, the opinions presented in various judicial decisions are a typical example of a simplification, an a priori refusal. Such decisions can be considered an aberration, see for instance the opinion articulated in the judgment of the Regional Court in Ostrava [CZE] of 2010³⁶ in which the judge held, inter alia: "*Arbitral award is not a document which could serve as the basis for enforcement; it is merely a legally null and ineffective piece of scribbled paper.*" Whether or not the judge in said case concluded that the arbitration agreement had suffered from defects which had rendered the agreement null and void, the words used by the judge clearly indicate his general view of arbitration as such. Such excessive statements are basically nonsensical and only a sober view of the matter can help find suitable instruments for the resolution of consumer disputes and the corresponding legal framework. It is quite logical that the framework will often be significantly influenced by national specifics. Similarly, we can frequently encounter a somewhat simplified argument used by the radical opponents of arbitration in consumer disputes, according to which the EU law prohibits arbitration agreements in consumer disputes. It is not possible to draw such a conclusion after a thorough analysis of the EU standards; the EU law does not prohibit arbitration clauses (i.e. pre-dispute arbitration agreements) and does not principally condemn the practice of incorporating arbitration clauses in the general terms and conditions of contracts.³⁷ Similarly, it is not possible to argue that any and every limitation of arbitrability of consumer disputes is a part of public policy.³⁸ EU law merely stipulates certain fundamental and, principally, very general standards for the protection of certain contracting parties (the so-called weaker contracting parties). The mechanism whereby the protection will be safeguarded is, to a great extent, a task entrusted to the national

legislators in the individual Member States. Indeed, the simplification of these issues and the use of the above mentioned arguments shielded behind the EU law, without any substantial analysis, are also harmful to the search for the most effective means of protecting legal relationships as such.

2.4. Consumer arbitration

A global assessment necessarily requires an evaluation of the degree of success and the prevailing opinions regarding arbitration in consumer disputes. This is probably the most difficult task. The analysis of the problem must principally start with its empirical assessment. How common is arbitration in consumer disputes? How prevalent (or unavoidable) is it in the markets in basic goods and services, such as medical care, banking and employment? Were the results of arbitration indeed unfavorable to the consumer when compared to the results achievable by other dispute resolution methods, i.e. if we did not employ arbitration or if the application of arbitration or some of the so-called ADR in these relationships were not mandatory as prescribed by some of the national legal systems?³⁹

For example, surveys conducted in the USA revealed very conflicting results. It is sometimes argued that a survey of arbitration regarding consumer disputes does not suffice as the basis for the evaluation and application of special consumer protection procedures. The approach adopted in the USA is, in this regard, very reserved and very moderate as concerns the provision of different protection to the parties in consumer disputes resolved by arbitrators, compared to arbitration in regular commercial disputes (i.e. other than consumer disputes). Some surveys with reasonably specific results are sufficiently valid to support the conclusion that arbitration in consumer disputes is favorable both to the consumer⁴⁰ and to the professional. As concerns the ratio of success of the parties, the results of certain studies are more in favor of the consumers⁴¹ whereas others indicate that the professionals are almost certain to win.⁴²

³⁹ However, this information is usually not available, save in various court reports which often do not hesitate to present absurd and extreme cases. See DAUER, E. (2000) "Judicial Policing of Consumer Arbitration." *Pepperdine Disp. Res. L. J.*, 2000, Vol. 91, No. 1, p. 2.

⁴⁰ There are even opinions claiming that the speed of the proceedings is ultimately always an asset for the consumer. Cf. for instance CASEY, K. R. (2009) *Hot Issues Alerts – Law Firms. Mandatory Consumer arbitration. The Metropolitan Corporate Counsel*, 5 August 2009. Available online at <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2009&EntryNo=10019> [last visit 7 August 2011].

⁴¹ See RUTLEDGE, P. (2007) "Testimony before the U.S. House of Representatives Committee on the Judiciary" (the topic of the session: "The Arbitration Fairness Act of 2007"), 25 October 2007, p. 5.

⁴² See RUTLEDGE, P. Testimony before the U.S. House of Representatives Committee on the Judiciary (the topic of the

³⁶ Judgment of the Regional Court in Ostrava, Czech Republic [CZE], case no. 33 Cm 13/2009 of 8 March 2010. The author of this article has at his disposal the full text of the respective decision. Nonetheless, it has already been cited in various sources. See for instance BABJÁKOVÁ, G. (2011) "Smlouvy uzavírané se spotřebitelem." [Title in translation: Consumer Contracts]. *Právní fórum [Legal Forum]*, Wolters Kluwer, Prague, Vol. 8, No. 7, pp. 334–339, here p. 337.

³⁷ See for instance judgment of the BGH [DEU], case no. III ZR 256/03 of 13 January 2005.

³⁸ Decision of the OGH [AUT], case no. 3 Ob 144/09m of 22 July 2009

But the very fact that the professional, i.e. principally the author of the contract offer, includes an arbitration clause in the consumer contract, is a major indication of his or her conviction that it will be advantageous for him/her. From this perspective, many arbitration agreements incorporated in consumer contracts in the USA support the opinions voiced by the proponents of special protection for the consumers' interests. The most that could be said is that both the professional and the consumer try to benefit from arbitration. Such (available) benefits include the costs of proceedings in particular countries and for particular types of arbitration, for instance the elimination of complicated court proceedings, special simplified procedures for the taking of evidence,⁴³ proceedings based only on written briefs or, conversely, only on oral hearings without any protracted exchange of sophisticated and, unfortunately, increasingly voluminous submissions (not only as a result of the possibility to use electronic communication and electronic processing of data).

We cannot, however, dismiss the fact that arbitration in consumer disputes generally entails a number of problems, especially as concerns the access of consumers to information; there are also many issues concerning fair trial⁴⁴ and the extent to which the principles of fair trial in arbitration are (or could be), to an acceptable extent, transformed into a form and manifestations different from litigation.

Opinions from certain countries argue that arbitration deprives the consumers of their fundamental rights in proceedings and in the protection of their rights. These rights include a jury trial in those countries where the jury is a mechanism incorporated in the legal system, or the right to court proceedings guaranteed in any and every case. The legal counsel for the parties may also argue that professionals are unduly benefiting from the process of taking of evidence which is, considering its complexity and systematics, insufficiently or only partially regulated in a number of the applicable arbitration rules⁴⁵. Although the principally identical procedural system applies to both parties to the same extent, the insufficient legal regulation of the process of taking of evidence de facto constitutes the heaviest burden for the consumer because the consumer is more likely to be interested in getting evidence from the professionals, so that the evidence could be used against them, than vice versa.⁴⁶

session: "The Arbitration Fairness Act of 2007"), 25 October 2007, p. 6.

⁴³ See for instance AMERASINGHE, CH. F. (2005) "Evidence in International Litigation." Brill Martinus Nijhoff Publishers, p. 43 et al.

⁴⁴ For example KURKELLA, M. (2005) Due Process in International Commercial Arbitration, New York: Oceana Publishing, regarding the principles of fair trial see p. 47 et al.

⁴⁵ See for instance KAUFMANN-KOHLER, G. (2003) Globalization of Arbitral Procedure, Vand. J. Transnat'l L., Vol. 36, p. 1313 et seq.

⁴⁶ See for instance BĚLOHLÁVEK, A. (2005) "Právo použitelné na řízení před rozhodci." [Title in translation: The

Another point of criticism is targeted at the professionals who are considered to be **frequent parties to arbitration**. As concerns dispute resolution, professionals are said to have an advantage over consumers due to the fact that they are involved in arbitration over these types of disputes repeatedly. By being a party to arbitration more frequently than the individual consumer, professionals gain experience in dispute resolution which give them an advantage over the consumers; conversely, the consumers have none or very limited experience. Apart from the advantage gained by experience, the issue can be complicated by a conflict of interests. Some dispute resolution centers (arbitral centers, permanent arbitral institutions)⁴⁷ can consider professionals who repeatedly appear as parties to disputes as the so-called permanent clients. Consequently, it is more likely that they will establish a system benefiting these "permanent clients" because the usages of large enterprises are important for strictly commercial entities providing arbitration services and facilities.⁴⁸ The same could be said about arbitrators (especially in the so-called *ad hoc* proceedings) who could realize that their regular appointment (and the associated remuneration) is a remuneration for awards favoring a frequent party, i.e. the party which often resorts to arbitration.

The factor of a frequent party [to the proceedings] is also significant with regard to the

Law Applicable to Arbitration]. Právo a podnikání [Law and Entrepreneurship], No. 11, pp. 2-9, BĚLOHLÁVEK, A. (2007) Procesní předpisy a rozhodčí řízení. [Title in translation: Procedural Laws and Arbitration]. Právní fórum [Legal Forum], Wolters Kluwer, Prague [CZE], 2007, Vol. III, No. 12, pp. 431-444, BĚLOHLÁVEK, A. et PEZL, T. (2008) "Aplikace procesních předpisů na rozhodčí řízení." [Title in translation: Application of Procedural Laws to Arbitration]. Právní rádce [Legal Advisor], Economia, Prague [CZE], 2008, Vol. 16, No. 2, pp. 16-24; DEGOS, L., PINSOLLE, P., SCHLÄPFER, A. -V. (eds.) (2005) "Towards a Uniform International Arbitration Law," Juris Publishing, New York, 2005; GOODE, R. (2001) The Role of the Lex Loci Arbitri in International Commercial Arbitration. Arbitration International, Vol. 17, No. 1, pp. 25-27 and in many other publications.

⁴⁷ The author is intentionally silent on permanent arbitral institutions. An attentive reader certainly will not miss the very sensitive context of this issue, especially in the Czech Republic. However, the focus of and the room reserved for this article do not allow even a sufficient identification of the problem, which has been labeled in our country as the problem of the status of the so-called arbitration centers v. permanent arbitral institutions in terms of Section 13 of Act No. 216/1994 Coll., as subsequently amended, on Arbitration and Enforcement of Arbitral Awards. A diligent and serious analysis of the issue is therefore out of the question entirely. This is the reason why the author intentionally hinted at the issue and the associated problems, without following the line of thought any further.

⁴⁸ See for instance 2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary University of London / School of International Arbitration (supported by many international corporations and law firms). It follows preceding studies executed in 2006 and 2008. Available for instance at <http://www.arbitrationonline.org/research/2010/index.html> [last visit 5 August 2011] and elsewhere.

absent, or only limited, permissible review of the awards in the merits rendered in arbitration. Although Czech law, for instance, namely Section 27 of the Czech Act on Arbitration [CZE], and similarly some other national arbitration laws, principally permit the review of arbitral awards by other arbitrators based on the parties' agreement, this possibility is employed only exceptionally, whether in the national or in the international practice. Despite the fact that the absence of appeal in arbitration principally reduces the costs and the length of the dispute, we cannot rule out the so-called unfair decisions irremediable *au fond*.⁴⁹ For a professional involved in a number of disputes, the risk of an incidental unfavorable decision is acceptable compared to the costs saved as a result of waiver of appeal. For the unsuccessful natural person, the results could be fatal.⁵⁰

Arbitration in consumer disputes is also criticized for lack of transparency. As opposed to most national court proceedings, arbitration is principally confidential.⁵¹ However, this criticism is usually countered by the fact that the other recognized dispute resolution methods, which could be considered an alternative to the finding of law outside the general judicial system, such as out-of-court settlements, are confidential too. On the other hand, although litigation is public (with certain exceptions)⁵² the course of the proceedings is hardly

interesting for any third party. After all, the same holds true for the publicity of case law. General case law is not well known either, with the exception of certain decisions of the lower courts which deserve being published or annotated, but this is usually only incidental. For example in the Czech Republic, the only decisions which are systematically published are usually only the rulings of the Supreme Court and the Supreme Administrative Court, as the results of frequently long-durable proceedings; the decisions of the lower courts are published only exceptionally. The same holds true for most countries. In connection with lengthy litigation involving more instances, it is necessary to emphasize the qualities of arbitration as cheaper and more simple proceedings – the minimization of costs, the expeditiousness and less rigorous formal requirements are the general criteria which consumer disputes resolution methods ought to fulfill. Besides, litigation in many countries is presently a very formal procedure, which often jeopardizes its ability to serve as a general guarantee of efficient protection of the law. The author is of the opinion that for instance the Czech procedural system often makes the very informal substantive law difficult to enforce. But the problem is not limited only to the Czech Republic, it significantly affects many other countries.⁵³ Also, we must not dismiss the important psychological factor which hypothetically disqualifies litigation compared to arbitration in consumer disputes. Whether we want to admit it to ourselves or not, it is true that even a simple notification of service of a document from the court is

⁴⁹ Cf., for instance, BĚLOHLÁVEK, A. et PEZL, T. (2006) *Mezinárodní a tuzemské rozhodčí řízení z pohledu čl. 36 listiny základních práv a svobod a pravomoci soudů a ústavou garantovaných práv (Institut zrušení rozhodčího nálezu v souvislosti se zákazem revision au fond)*. [Title in translation: International and Domestic Arbitration from the Perspective of Article 36 of the Charter of Fundamental Rights and Freedoms and the Powers of the Courts and the Rights Guaranteed under the Constitution (Annulment of Arbitral Awards in Connection with the Prohibition of Revision au Fond)]. Právník [The Lawyer], Institute of State and Law, Academy of Science of the Czech Republic, Prague [CZE], Vol. 146, No. 7, pp. 768–802.

⁵⁰ DAUER, E. (2000) "Judicial Policing of Consumer Arbitration." *Pepperdine Dispute Resolution Law Journal*, Vol. 91, No. 1, p. 3.

⁵¹ BĚLOHLÁVEK, A. (2011) "Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals." In: BĚLOHLÁVEK, A. et ROZEHNALOVÁ, N. *CYArb – Czech (& Central European) Yearbook of Arbitration*, Vol. 1, pp. 23–47 (in the cited source see also the comparison with arbitrations in other than the so-called consumer disputes).

⁵² Indeed, the ECtHR has repeatedly concluded that waiver of the right to public proceedings (public trial / public hearing) is legitimate if based on a voluntary expression of will. In connection with arbitration, see the ECtHR for instance in: *Osmo Suovaniemi et al. v. Finland* (dec.), case no. N. 31.737, 23 February 1999. The issue of fair trial within the meaning of oral hearings and public proceedings was addressed by the ECtHR generally with respect to litigation for instance in (•) *Allan Jacobsson v. Sweden*, ECHR Rep., 19 February 1998 (an unpublished decision); (•) *Håkansson v. Sweden*, 13 EHRR 1 (1990), ECHR Rep.; (•) *Pauger v. Austria*, 25 EHRR 105 (1997), ECHR Rep.; (•) *Bryan v. United Kingdom*, 21 EHRR 342 (1995), ECHR Rep. The issues of public court proceedings were specifically addressed by the ECtHR for instance in: (•) *Diennet v. France*, 21 EHRR 554 (1995), ECHR Rep.; (•) *Sutter v.*

Switzerland, 6 EHRR 272 /1984), ECHR Rep.; (•) *Ruiz-Mateo v. Spain* 16 EHRR 505 /1993), ECHR Rep.; (•) *X v. Austria* (dec. Commission), No. 5362/72, 42 CD 145 (1972), EComHR, (ix) *Kamasinski v. Austria*, 13 EHRR 36 (1989), ECHR Rep. At the same time, however, it is required that the waiver of a particular right (as a component of fair trial) must be unequivocal. For more details see, for instance, BĚLOHLÁVEK, A. *Arbitration from Perspective of Right to Legal Protection and Right to Court Proceedings (the Right to Have One's Case Dealt with by a Court): Significance of Autonomy and Scope of Right to Fair Trial*. In: BĚLOHLÁVEK, A. et ROZEHNALOVÁ, N. *CYArb - Czech (& Central European) Yearbook of Arbitration. The Relationship between Constitutional Values, Human Rights and Arbitration*, Huntington (New York): JurisNet, 2011, Vol. 1, pp. 47–70.

⁵² See the ECtHR in *Osmo Suovaniemi et al. v. Finland* (dec.), case no. N. 31.737, 23 February 1999 et al. However, some sources are based on the presumption that the arbitration agreement automatically implies an intention to exclude the public. This is typical primarily for common law countries. See for instance JOSEPH, D. *Jurisdiction and Arbitration Agreements And Their Enforcement*. London: Sweet & Maxwell, 2005, p. 97, marg. 4.22. Joseph refers to the case [GBR] *Dept. of Economic Policy of the City of Moscow v. Bankers Trust Co. International Bank*, [2004] 2 Lloyd's Rep. 1, 17. It is evident that the key point is voluntariness and genuine consensus regarding the arbitration agreement. After all, this is the crucial issue especially as concerns consumer contracts and arbitration agreements concluded between a consumer and a professional.

⁵³ As a matter of fact, the proceedings in the Czech Republic are faster than in many other European countries.

frequently stressful for regular citizens. The rules regulating behavior and hearings in courts (gowns, oral presentations done in standing positions etc.), which are undoubtedly necessary, correct and justified with public authorities, could in consumer disputes favor the entities regularly appearing in proceedings, i.e. professionals. This very simple and often rather simplified list of certain factors, many of which are criticized by this or that system, indicates how easy it is to criticize one or the other system and how difficult it is to come up with an impartial and objective evaluation. Unfortunately, most of the various evaluations of the individual systems are limited to the same list and the same extent which the author attempted above by listing the most important aspects. A thorough and objective analysis is usually absent and many commentators and persons evaluating the dispute resolution methods voice their opinions before the analysis itself and rather look for and emphasize arguments favoring their views. Obviously, the procedure should be reversed, i.e. the opinion should be articulated only after a thorough and objective analysis.

2.5. Right to legal protection versus right to judicial protection and the importance of autonomy

The European Court of Human Rights (ECtHR) is regularly confronted with and issues decisions dealing with arbitration. Logically, arbitral issues are discussed in connection with applications complaining of the violation of Article 6(1) of the ECHR.⁵⁴ The author is of the opinion, though, that the application of the ECHR and, generally, the constitutional principles relating to arbitration cannot be limited to the issue of *fair trial*. These matters are also important from the view of the protection (inviolability) of ownership and other fundamental rights, although this particular perspective has been (in the author's opinion) somewhat neglected by the case law of the ECtHR.⁵⁵

The ECtHR commonly deals with issues such as whether and to what extent Article 6(1) of the ECHR is applicable to arbitration and whether and to what extent it is possible to *waive* these standards or modify the arbitral proceedings by contract, meaning the possibility to agree upon an arbitration agreement and, as the case may be, the case management of the arbitral proceedings. In that connection, the ECtHR

distinguishes between *ad hoc* arbitral proceedings and the so-called institutionalized proceedings⁵⁶ and deals with a number of other issues.

The right to enter into an arbitration agreement, i.e. waive judicial protection in terms of the protection afforded by public authorities (the judiciary), must be looked for primarily in another fundamental freedom, namely the freedom to express one's will.⁵⁷ Freedom of will is guaranteed by national constitutional codes of fundamental rights and by rules of international origin, especially the ECHR.⁵⁸ The author believes that the freedom to express one's will must be interpreted as included in the principles of the rule of law,⁵⁹ at the same time,

⁵⁶ Cf. for instance BĚLOHLÁVEK, A. (2005) "Rozhodčí řízení ad hoc vs. řízení před stálými rozhodčími soudy a postavení tzv. rozhodčích center." [Title in translation: Ad Hoc Arbitration v. Proceedings before Permanent Arbitral Institutions and the Status of the So-Called Arbitral Centers]. Bulletin advokacie, Czech Bar Association, Prague [CZE], No. 10, p. 54; LISSE, L. (2006) "K právnímu postavení arbitrážních center." [Title in translation: Regarding the Legal Status of Arbitral Centers]. Bulletin advokacie, Czech Bar Association, Prague [CZE], 2006, No. 1, p. 40; PAVELKA, M. (2005) "Rozhodčí řízení před tzv. rozhodčími centry." [Title in translation: Arbitration before the So-Called Arbitral Centers]. Bulletin advokacie, Czech Bar Association, Prague [CZE], Nos. 7–8, p. 58; SCHÜTZ, R. A. et AL. (2006) "Institutionelle Schiedsgerichtsbarkeit." Carl Heymanns, Köln a. R.; TRAPL, V. (1999) "K otázce zřizování stálých rozhodčích soudů" [Title in translation: Regarding the Issue of Formation of Permanent Arbitral Institutions], Právní praxe v podnikání, Vol. 8, No. 7, p. 19; LACHNIT, P. (1998) "Statut rozhodčího soudu při HK ČR a AK ČR." [Title in translation: The Statute of the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic]. Daně a finance, No. 24, p. 5 et al.

⁵⁷ For more details see BĚLOHLÁVEK, A. et PEZL, T. (2007) "Mezinárodní a tuzemské rozhodčí řízení z pohledu čl. 36 Listiny základních práv a svobod a pravomocí soudů a ústavou garantovaných práv (Institut zrušení rozhodčího nálezu v souvislosti se zákazem revision au fond)." [Title in translation: International and Domestic Arbitration from the Perspective of Article 36 of the Charter of Fundamental Rights and Freedoms and the Powers of the Courts and the Rights Guaranteed by the Constitution (Annulment of Arbitral Awards in Connection with the Prohibition of Revision au Fond)]. Právník [The Lawyer], Institute of State and Law, Academy of Science Czech Republic, Prague [CZE], Vol. 146, No. 7, p. 768. Regarding certain partial issues cf. SLOVÁČEK, D. (2009) "Ochrana spotřebitele a rozhodčí doložky." [Title in translation: Consumer Protection and Arbitration Clauses]. Bulletin advokacie, Czech Bar Association, Prague [CZE], Vol. 20, Nos. 7–8, p. 46; SLOVÁČEK, D. (2010) "Rozhodčí řízení a směrnice o nepřiměřených podmínkách ve spotřebitelských smlouvách." [Title in translation: Arbitration and the Directive on Unfair Terms in Consumer Contracts]. Právní rozhledy, C. H. Beck, Prague [CZE], Vol. 18, p. 331 et seq., here p. 332 et al.

⁵⁸ For instance from the perspective of Article 2(4) of the Constitution [CZE] which identical to Article 3 of the Charter [CZE]. For instance in Article 2(3) of the Charter [CZE] which reads as follows (cit.) "Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him or her by law." Similar provisions also in national constitutional regimes.

⁵⁹ See HENDRYCH, D., SVOBODA, C. et al. (1997) "Ústava České republiky. Komentář." [Title in translation: Constitution of the Czech Republic. Commentary]. C. H. Beck, Prague [CZE], p. 613.

⁵⁴ Cf. in general, for instance, MIKULE, V. (1994) "Ještě ke správnímu soudnictví a jeho organizaci." [Title in translation: A Few More Comments on Administrative Judiciary and its Organization]. Právní praxe [Legal Practice], Prague [CZE], No. 4, p. 185.

⁵⁵ But it is not an omission on the part of the ECtHR. The ECtHR is bound by the wording of the complaint (application) addressed to the Court. It is usually the fault of the parties who fail to see a number of potential connections under the constitutional law in conjunction with other fundamental rights. This problem is, however, by no means limited to arbitration.

the case law of the supreme and constitutional courts of many countries also indicates that this doctrine must be perceived as principally defining the limits of the exercise of state power vis-à-vis the individual's autonomous will. Autonomy of will and free individual conduct of individuals must be interpreted both as a restriction on the state's power to limit the conduct of individuals by means other than an explicit statutory prohibition or an explicit statutory order, and as a full respect paid by the state to the exercise of free will, or a respect for the acts of individuals which are not explicitly prohibited or ordered (subject to mandatory or even overriding mandatory rules).⁶⁰

Consequently, where the two above mentioned doctrines of the constitutional system intersect, the conflict (albeit only illusory) must always result in a conclusion which will not suppress either of the two doctrines. If we apply the above said to the conflict of free will and inalienability of right, we must presume that the individual's expression of will was performed freely and with full knowledge of the consequences of such an expression of will for the individual. If, and only if, there is any reasonable doubt regarding the freedom of the expression of will or its very purpose, it is necessary to examine whether the free expression of will resulted in a waiver of rights to such extent which makes it constitutionally unacceptable. The legislative incorporation of the freedom of will also implies the right to make free

decisions as to whether and how the relevant individual does or does not exercise his or her right.⁶¹ No such step adopted by the individual could be generally labeled as violating the principle of inalienability of rights. By defining these fundamental rights and freedoms and the doctrines of their application, the state undertakes to honor these rights. The primary issue is to define the vertical effect of the fundamental rights, i.e. in the *state v. citizen* relationship.⁶² The delimitation of the relationship between citizens (the so-called horizontal effect) is generally perceived as secondary. In other words, it is not possible to apply the general constitutional doctrine to the relationship between private entities unless one of them breaches a subjective right of the other and the breach is the subject of proceedings before the competent state authority safeguarding the protection of rights.⁶³

Once the inalienability of rights has been clarified, we must proceed to the analysis of what constitutes the generally recognized right to submit one's dispute to an independent and unbiased court.⁶⁴ It is a guarantee afforded to individual persons (both natural and legal persons), i.e. the right to address an unbiased and independent court through the legally prescribed procedure, in order to protect and/or enforce one's rights. Nevertheless, the possibility to protect one's rights by submitting them to court is a right, not an obligation. At the same time, the *forum* which is to rule on the person's rights must be independent and unbiased. Last but not least, the exercise of the right by the individual as well as the

⁶⁰ Cf. for instance the decision of the Constitutional Court [CZE], I ÚS 546/03, published in *Sbírka nálezů a usnesení Ústavního soudu* [CZE] [Constitutional Court Reports], Vol. 32 under the ref. no. 12. The possibility to exclude the jurisdiction of courts as public authorities within the framework of the given legal system, in terms of the requirements of the objective and subjective arbitrability, in connection with Article 36(1) of the Charter [CZE], was confirmed by the CC CR [CZE] in its decision case no. I. ÚS 16/02, which reads as follows (cit.) "[...]The procedural guarantee in Article 36(1) [of the Charter], when combined with the constitutional principle in Article 2(2) of the Charter, acquires its material substance because a transgression of the competence vested in the state authority by the law would result in a failure to protect rights [...]", id est conversely, failure to honor the expression of will of the parties incorporated in the arbitration agreement and a permission of revision au fond in the case of an arbitral award if the award was issued within the limits of the objective and subjective arbitrability, would violate Article 36(1) of the Charter [CZE] in conjunction with Article 2(2) of the Charter [CZE] and Article 2(3) of the Charter [CZE], as well as other constitutional imperatives and principles. Cf. also, for instance, ŠAMALÍK, F. (1994) "Lidská práva – základ demokratické legitimacy." [Title in translation: Human Rights – Basis of the Democratic Legitimacy]. *Právník* [The Lawyer], Institute of State and Law Academy of Science Czech Republic, 1994, No. 1. Concerning the meaning of overriding mandatory rules see for instance BĚLOHLÁVEK, A. (2010) "Rome Convention / Rome I Regulation. Commentary. New EU Conflict-of-Laws Rules for Contractual Obligations. Vol I & II." JurisPublishing, Huntington, NY (US), 2010, commentary on Article 9 of the Rome I Regulation, PAUKNEROVÁ, M. (2010) "Overriding Mandatory Rules and Czech Law." In: BĚLOHLÁVEK, A. et ROZEHNALOVÁ, N. CYIL – Czech Yearbook of International Law, JurisPublishing, Huntington, NY (US), Vol. 1, pp. 81–94.

⁶¹ Cf. for instance TELEČEK, I. (2007) "Přirozené právo osobností a jeho státní ochrana." [Title in translation: Natural Privacy Law and its Protection by the State]. *Právní rozhledy*, Vol. 15, No. 1, pp. 1–10.

⁶² For instance Article 1(3) of the Fundamental Law of the Federal Republic of Germany ("Grundgesetz") (cit.): "The following fundamental rights are binding on the legislature, the executive and the judiciary as directly applicable law." In: KLOKOČKA, V. et WAGNEROVÁ, E. (1997) *Ústavy států Evropské unie* [Title in translation: Constitutions of the EU Member States], Linde, Prague [CZE], 1997, p. 236.

⁶³ Cf. for instance BARTON, M. (2006) "Horizontální působení základních práv jako způsob pronikání ústavního práva do práva obyčejného (podústavního)." [Title in translation: The Horizontal Effect of Fundamental Rights as a Method Whereby the Constitutional Law Penetrates Ordinary (Sub-Constitutional) Law]. In: KLÍMA, K. (ed) *Interpretace práva Ústavními soudy (teoretické reflexe)*, Sborník teoretického semináře [Interpretation of the Law by Constitutional Courts (Theoretical Essays), Theoretical Seminar Collection], Aleš Čeněk, Plzeň [CZE].

⁶⁴ In the Czech Republic [CZE] see Article 36 of the Charter [CZE] (and similarly other constitutional systems). The relevant provision reads as follows (cit.): "Everyone may assert, through the legally prescribed procedure, his or her rights before an independent and impartial court or, in specified cases, before a different authority and further (cit.): Unless the law provides otherwise, a person who claims that his or her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts."

fulfillment of the right by the court are subject to adherence to the prescribed procedure.

Article 6(1) of the ECHR guarantees the right to a fair and public hearing by an impartial and independent tribunal established by law. The wording of Article 6(1) of the ECHR clearly indicates that it only applies to those institutions which are established by law and for which the state can therefore assume liability. Obviously, the assessment of the relationship of the rights set forth in Article 6(1) of the ECHR depends on whether the decisions made by arbitrators in arbitration can be considered, under *lex arbitri* and other national rules, as decisions rendered by public authorities, i.e. authorities established by law and deemed to be tribunals for the purposes of the ECHR. The author is of the opinion, though, that such interpretation can be accepted only with respect to the scope of application of the mechanisms designated by the ECHR as international instruments for the protection of fundamental rights (especially the possibility to address the ECtHR after the instruments of protection at the national level are exhausted). The right to legal protection as such, however, is much more extensive and broader. It cannot be limited to the mechanisms anticipated by the ECHR (here in terms of the ECHR) or other legal (juridical) acts, whether at the international level or at the national levels. The right to legal protection is inherent to the essence of power exercised by public authorities, in whatever manner, over every individual depending on his or her personal status (usually nationality) and/or depending on the place of his/her residence or temporary stay. Public authorities are not only endowed with rights, they are also bound by obligations owed to the individuals, such as the offer of the possibility of legal protection. State power is not only the bearer of authority, it has also assumed obligations towards the persons who are subject to this authority. It is irrelevant whether we view state power as a contract between the citizen and the state or as something implied by the essence of the state and a fundamental quality thereof.

The author maintains that it is necessary to make strict distinctions between the right to judicial protection and the right to legal protection. The former represents the right to submit one's case to a court or another public authority. It can be *waived* on the basis and to the extent of the autonomy of will and freedom of contract enjoyed by the particular entity. Conversely, the latter cannot be waived. The possibility of such waiver would imply a waiver of one's own personality, unacceptable in a modern society. Any right guaranteed by the substantive law loses its meaning when deprived of the procedural instruments safeguarding the protection thereof, i.e. protection *by way of law*. The author fully agrees that the conclusion of an arbitration agreement means that the person (the party to the agreement) waives the right to judicial protection, i.e. protection afforded by public [procedural] mechanisms. It is not a waiver of

legal protection, though. Due to, and in consequence of, his or her autonomy of will, the person – when he or she concluded the arbitration agreement – only opted for an alternative which is, nonetheless, also offered by law, i.e. the same fundamental law which allows him or her to invoke judicial protection. Consequently, the state (state power) does not restrict the right to legal protection and offers only various alternatives. If the person exercises his or her autonomy and chooses arbitration, he or she waives the right to judicial protection. Nonetheless, judicial protection as a public-law mechanism applies whenever the person fails to exercise his or her autonomy and freedom of contract or the exercise is *contra legem* (usually to an extent which is not permitted by law or in a manner which is null and void or without effect for other reasons). The author opines, though, that this means that arbitration is the finding and application of the law, not a mere process of searching for an agreement or the terms of an agreement between the parties. Naturally, however, the state cannot assume liability for the manner whereby legal protection is administered by private-law mechanisms (in the present case through arbitration). Although arbitrators and arbitral tribunals are not public authorities, they represent instruments of legal protection. Their decision making therefore constitutes a mechanism for finding the law, establishing the contents of the law and applying the law to the facts of the case, all in a manner approved by the law.

Finally, it is necessary to emphasize that some national *leges arbitri* explicitly accept the possibility of an agreed waiver of the right to demand annulment of an arbitral award in court. Such an alternative is not unique at the level of national legal systems. But it only demonstrates the respect paid to the individual's autonomy of will. It does not constitute waiver of the right to legal protection. It is merely an accentuation of the contractual autonomy as a component of the autonomy of will, with a more explicit emphasis on the responsibility of the individual for his or her legal (juridical) acts (his or her conduct). This possibility is usually contingent on the requirement that the respective proceedings are international proceeding, i.e. one of the parties is an entity foreign to the state in the territory of which the proceedings are conducted. This is logical because the state (state power) assumes much less responsibility for the performance of its commitments owed to individuals where such international dimension is present.

Undoubtedly, the right to legal protection as well as the right to judicial protection assume a different dimension with respect to consumer protection. Autonomy of will enjoyed by the parties collides with the protection of the so-called weaker party. For example, the Constitutional Court of the

Czech Republic [CZE]⁶⁵ commented on the conflict as follows (cit): “The respect for and the protection of the autonomy of will are the elementary prerequisites for the functioning of the material rule of law; it is a *matrix* of the relationship between an individual and the state power, in the sense of a *constant* before brackets *which encompasses the individual fundamental rights articulated by positive law in response to their massive violation by authoritarian or totalitarian regimes*. Consequently, the principle of autonomy allows the parties to an arbitration agreement to waive, freely and intentionally, their right to submit their dispute to an independent and unbiased court.⁶⁶ The consumer protection laws aim primarily at the protection of the weaker contracting party (the consumer); this is a distinct trend in our modern private law. However, protection of the **autonomy of will cannot be absolute in a situation which involves another fundamental right of the individual or a constitutional principle or another constitutionally approved public interest** that are capable of **proportionately restricting** the autonomy of will.”⁶⁷ This conclusion can be basically accepted. It is necessary to emphasize and require, though, that the expression of will of the parties and their true interest be examined in each individual case. Any attempts at generalization must be rejected. It is also necessary to refuse any attempt at presuming the absence of the expression of will, which should be a manifestation of the right to legal protection (whether judicial protection or protection in arbitration). A contrary principle would result in an undue suppression of the rights of the other contracting party, namely the professional. The conflict can be solved through the mechanism of the burden of proof. Indeed, this approach has been largely implemented by courts in the USA (including, and especially, by the courts of the individual U.S. states); and it is by no means exceptional that the contract negotiation process between the professional and the consumer (or wherever the specific protection of the *weaker party* is required) is recorded audiovisually. The author is therefore of the opinion that the balance between contractual autonomy and protection of the weaker party must be found in the procedural mechanisms which should apply both in arbitration and in litigation. The key issues are: (i) an individual detailed examination of the factual and legal circumstances of each particular case and (ii) shifting of the burden of proof (as opposed to regular finding of the law in which consumer protection does not

apply) to the detriment of the professional who is required to prove that the arbitration clause (just like the other terms of the contract negotiated between the professional and the consumer) is a genuine, serious and unambiguous expression of will of both parties.⁶⁸ The same criteria must be applied to the approach of the parties to the performance of the contract after it was concluded. For instance, if the consumer failed to challenge the arbitration clause during arbitration and raised the defense only in the proceedings on the annulment of the arbitral award, or only in the proceedings on (recognition and) enforcement of the arbitral award, such approach can be in individual cases interpreted as a proof that the arbitration clause was negotiated as a genuine expression of will and the consumer invokes the consumer protection mechanisms only after he or she did not succeed in the proceedings on the merits. Naturally, such approach constitutes an abuse of the consumer’s rights. This is the reason why the approach of the parties to the performance of the contract and the exercise of their rights under the contract is also a significant indicator for a conclusion on whether the arbitration clause and the other terms of the contract concluded by the consumer are (were at the conclusion of the contract) contrary to the legal standards for the protection of the weaker party, and whether they are consequently subject to the corresponding consequences (nullity or invalidity etc., depending on the doctrine adopted by the respective national legal system), or whether, conversely, the arbitration agreement (and, as the case may be, the other contract terms) is an expression of the genuine will of the parties.

It is necessary to carefully distinguish between a situation where the consumer acts in compliance with the contract or a provision of the contract and thereby demonstrates that the contract reflected his or her [genuine] will, and a situation where the consumer *merely* fails to challenge the validity of the contract, usually as a result of his or her lesser knowledge of the law, which must be assessed according to the benchmark of the *lay knowledge of the law* attributable to a usual (average) consumer. The latter case requires that we allow more space to the application of the law in other stages of the proceedings, not only at the main stage of finding the law. After all, this is closely related to the court’s obligation to examine the nature of the terms in a consumer contract *sua sponte* (of its own motion), as well as to the determination of what information was

⁶⁵ Judgment of the CC CR [CZE], case no. II. ÚS 2164/10 of November 2011.

⁶⁶ The Constitutional Court of the Czech Republic [CZE] invoked its prior rulings, for instance:

- Resolution of the CC CR [CZE], case no. I. ÚS 2619/08 of 18 November 2008;

- Resolution of the CC CR [CZE], case no. II. ÚS 805/06 of 8 January 2007.

⁶⁷ The Constitutional Court of the Czech Republic [CZE] invoked its prior ruling, namely Judgment of the ConCourt CR [CZE], case no. II. ÚS 3/06 of 6 November 2007.

⁶⁸ See for instance the ECJ Judgment, Case C-243/08 of 4 June 2009 (Pannon GSM Zrt v. Sustikné Györfi Erzsébet [Pannon GSM]). In this particular context, the decision in the Pannon GSM case is sometimes neglected and the relevant conclusions are somewhat suppressed. This decision is also less often cited in connection with arbitration because the case concerned a choice-of-court clause, not an arbitration clause. In terms of consumer protection, however, the conclusions (such as in the Pannon GSM case) regarding choice-of-court agreements must under usual circumstances be applied to arbitration agreements as well.

provided to the consumer at the negotiation of the contract and in what form.⁶⁹ Besides, the ECJ's case law also highlights the obligation to have regard to the will of the consumer when deciding on the validity (or nullity) of the contract or an individual term thereof.⁷⁰ Such an expression can be assessed not only in view of the circumstances attending the conclusion of the contract but also with respect to the parties' approach to the performance under the contract⁷¹ (including the period after the claim or lawsuit was filed, irrespective of the *forum*).

⁶⁹ Cf. for instance the ECJ Judgment, Case C-227/08 of 17 December 2009 (*Eva Martín Martín v. EDP Editores SL*), CELEX: 62008P0227C(01). According to the ECJ ruling (cit.): "Article 4 of Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises does not preclude a national court from declaring, of its own motion, that a contract falling within the scope of that directive is void on the ground that the consumer was not informed of his right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts."

⁷⁰ See the ECJ Judgment, Case C-227/08 of 17 December 2009 (*Eva Martín Martín v. EDP Editores SL*), CELEX: 62008P0227C(01). Although the ECJ rendered its decision in connection with Article 5(1) of Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises, there is no reason not to apply the conclusion in a more general context. In other words, the ECJ does not limit its opinion to the quoted provision.

⁷¹ See the ECJ Judgment, Case C-243/08 of 4 June 2009 (*Pannon GSM Zrt v. Sustikné Györfi Erzsébet* [Pannon GSM]).