EU CONSUMER PROTECTION IN THE CIVIL PROCEEDING

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Abstract: The consumer protection is one of the priorities of the EU internal market. The pressure on the growth of the competitiveness motivates some businessmen to use unfair practices especially against those, who are usually not informed on the market situation very well. Therefore the EU law maker adopted the minimum standard of the consumer protection, which is valid in all EU member states. The Council Directive 93/13/EEC names some terms used in the consumer contracts, which could be considered as unfair. If there is a proof of their unfair character, it is the role of the national courts to ensure these terms are not binding on the consumers. The Court of Justice of the EU asks the national courts to take into account the unfair terms of the consumer contracts by virtue of office. The Slovak execution courts misuse this power when stopping the proceeding due to pure existence of an arbitration clause in a consumer contract.

Keywords: consumer, unfair terms, national courts, Court of Justice of the EU.

Introduction

The European Union is an international organization established on the economic integration. Its main objective is to create an internal market of the free movement of goods, services, persons and capital without borders among the member states. Therefore it is necessary to ensure the free economic competition among the market subjects with clear defined legal rules. The market competition is even harder and the producers of goods and the providers of services need to increase their competitiveness by the more qualitative outputs and pressing down their costs. The hard competition tempts the businessmen to various unfair practices, especially against the market subjects who are less informed on the market situation, have less skills and knowledge on the prices, quality of products and competitive products; also against consumers buying the goods and services for their own needs, or needs of their family members. With the aim to eliminate these unfair practices of businessmen and to restore the balance between the rights and obligations in the private contracts, the consumer policy has become one of the policies on the EU internal market. Furthermore, the article 38 of the Charter of fundamental rights of the EU inserts the consumer protection to the human rights and freedoms. According to this article *Union policies shall ensure a high level of consumer protection*. The Treaty on the Functioning of the European Union enables to adopt the legal rules related to the consumer protection on the supranational EU level (art. 169 TFEU). The system of the consumer protection "*is based on the idea that the consumer is in a weak position vis-a-vis the seller or supplier, as regard both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.*"[1] This imbalance between a consumer and a seller/supplier should be restored by the cogent legal rules adopted by the EU law maker. These EU legal rules include the minimum standards of the consumer protection respected in all EU member states but the national law makers can adopt the stricter legal rules while they are conformed to the EU law. The consumer does usually not know the national law of other member states and the fear of the foreign law could be a barrier of the cross border business transactions. The EU law has introduced the supranational minimum standard of the consumer protection valid in all EU member states to develop the cross border activities without fear of the foreign legislations. The minimum standard is stipulated in the EU secondary law; one of the most important EU laws is the Council Directive 93/13/ECC on unfair terms in the consumer contracts. This Council Directive names the terms which will be considered as unfair if their unfair character is proven. Then there is a role of the EU member states to ensure these terms will not be binding on the consumers. It is the cogent rule, which "*taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.*"[2]

1 Consumer in the EU law and the Slovak law

According to article 2b) the Council Directive 93/13/EEC on unfair terms in consumer contracts, a consumer means *any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.* The article 2a) of Directive of the European parliament and Council 2005/29/EC defines a consumer as *any natural persons who, in commercial practises covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*. Many other Directives of the European Union define a consumer only as a natural person, not legal entity. Some doubts on the status of a consumer as a natural person result from the Council regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I). According to the article 15 of this regulation a consumer is *a person, who concludes a contract for the purpose which can be regarded as being outside his trade or profession*. Rozehnalová and Týč[3] stated that it is related to the natural persons as well as legal entities; because the regulation takes into account the specific conditions of the national legal regulations of the Scandinavian countries. In these countries, consumer is a natural person as well as a legal entity, mainly various NGOs (such as civil associations, foundations, interests associations etc.), which do not have skills and information in the same level as the sellers or suppliers, who are acting for purposes relating to their trade, business or profession.

The Slovak law has two legal definitions of the consumer. The first one is in the Civil Code; § 52 (4) of this Code defines a consumer as a natural person, who concludes a contract for the purpose which is outside his trade or professional activities. The second one is in the law no. 250/2007 Coll. on consumer protection. According to the § 2a) of this law, a consumer is not only a natural person but also a legal entity, who buys goods and uses services for personal needs or needs of members of his/her household.

The EU law maker prefers a consumer as a natural person in the most of cases, but it reserves this issue on the member states in the case of the jurisdiction according to the Brussels I. because of maintenance of the right to the fair trial if some member states consider a consumer also as a legal entity. However, the various definitions in the legislation of the one member state may result in many misunderstandings. The Civil Code of the Slovak republic stipulates that a consumer is only a natural person; the law on consumer protection determines a consumer moreover a legal entity. According to the § 3 (3) of this law (no. 250/2007 Coll.) any consumer (also a natural person as well as a legal entity) buying goods or using services for personal needs or needs of the members of his/her household has the right for protection against the unfair terms in the consumer contracts according to the § 52-54 of the Slovak Civil Code. However, the Slovak Civil Code and the Council Directive 93/13/EEC do not include a legal entity into the legal consumer protection. Therefore there is a question if some legal entities have the rights to claim the unfair terms according to the Slovak Civil Code and this Council Directive as well. The legal rules of the § 3 (3) and

[1] Judgement of the Court of Justice of the EU dated 26.10.2006 in case C-168/05 Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL (25)

[2] Judgement of the Court of Justice of the EU dated 26.10.2006 in case C-168/05 Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL (36)

[3] ROZEHNALOVÁ, N. – TÝČ, V. 2006. *Evropský justiční prostor (v civilních otázkách).* Brno: Masarykova univerzita, 2006, p. 97-98

the § 2a) of the law no. 250/2007 Coll. are contrary to the § 52 (4) of Slovak Civil Code. In addition, the definition of a consumer in the law no. 250/2007 Coll. is controversial because of personal needs of a legal entity including the personal needs of the members of its household. For comparison, the Czech legal regulation stipulates a consumer only as a natural person, who is acting outside his/her trade or profession. Finally the Court of Justice of the EU decided "*the term consumer, as defined in Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as referring solely to natural persons.*"[4]

2 Consumer contract

According to the § 52 of the Slovak Civil Code, a consumer contract is any contract regardless the legal form, which is concluded between a consumer and a businessmen acting within his/her trade or profession. It is not a new form of the typical contracts regulated by the Civil Code or the Commercial Code but it is any typical (such as purchase contract, rent contract or contract for work) or any atypical contract (not regulated directly by the named Codes), which one of the contract parties is a consumer within the meaning of the § 52 (4) of the Slovak Civil Code. *A contrario* a purchase contract or a contract for work is not a consumer contract if both contract parties are only businessmen or only consumers.

A consumer contract is different from the "classic" contract by the fact that the terms causing the imbalance of the rights and obligations between the contract parties are unfair and therefore invalid (the § 53 (5) of the Slovak Civil Code). A term of a contract could be reviewed to be unfair under these presumptions:

- there is a consumer contract, so that a consumer is one of the contract parties;
- the potential unfair terms have not been individually negotiated; it means the consumer were not able to influence this terms in the contract;
- the terms are related to the main object of the contract and the adequacy of the price unless they have been negotiated clearly, comprehensible and certainly.

There is not necessary the existence of the cross-border element for the application of the Council Directive 93/13/EEC. It means that the rules of Directive are applicable in each consumer contract regardless the place of doing business or citizenship of the contract parties.

According to the article 6 (1) of the Council Directive 93/13/EEC, the 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 term*. The § 53 (3) of the Slovak Civil Code declares that these unfair terms will be invalid but it is not clear stipulated if the invalidation is void or voidable. The jurisprudence is not united in this issue. "(...) the rules which cause the imbalance in the rights and obligations not in favour of a consumer are unacceptable and therefore voidable within the meaning of the § 40a of the Civil code."[5] On the contrary, Vojčík et al. (2008) consider these rules are void: "According to the § 53(5), the unacceptable terms in the consumer contracts are void."[6]

The second opinion is more probable. Firstly, the § 40a of the Civil Code includes the numerous clauses reasons of the voidable legal actions and there is no reason related to the unfair terms of the consumer contracts. Secondly, according to the European Union law, the member state shall lay down that unfair terms shall not be binding on the consumer. The Slovak republic as one of the EU member states will not be able to fulfill this duty if the unfair terms are only voidable. In the case of the voidable actions, the court may take into account the unfair terms only when the consumer shall it claim during three years since the concluding the contract. By the expiration of these three years after the concluding the consumer contract, the consumer would not be able to claim the unfair term successfully. Thirdly, the Court of Justice of the EU stated: "*The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms.*"[7] Thus, the national courts have a duty to take into account the unfair terms by virtue of office and this condition could not be fulfilled in the case of voidable legal action because in this case, a national court is limited by the claim of the claimant (consumer).

3 Unfair terms in the consumer contracts

According to the § 53 of the Slovak Civil Code, an unfair term is any term, which can cause an imbalance in the rights and obligations of the contract parties not in favour of the consumer; this term has not been negotiated individually and is not related to the main object of the contract or adequacy of the price, which is defined clearly, comprehensible and certainly. The main object and the price are usually the essential elements of a contract. Therefore these elements are considered as negotiated individually without burden of proof if they are defined clearly and comprehensible; otherwise the consumer protection could threaten the legal certainty and legitimate expectations of the contract parties. The Court of Justice of the EU enables to the member states to stipulate the stricter conditions for the consumer protection. According to its judgement Caja de Ahorros "*articles 4 (2) and 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language*."[8]

The § 53 (4) of the Slovak Civil Code includes only the exemplificative enumeration of the potential unfair terms, which could be inserted into a consumer contract. The Council Directive 93/13/EEC names also only the examples of the potential unfair terms that could be present in the consumer contracts. Therefore it is necessary to judge an unfair tem in an individual case within all circumstances related to this case. The general conditions necessary to take into account in each individual case can be defined as follows:

- Does the term cause the imbalance in the rights and obligations not in favour of the consumer? If so, is it a consumer contract? If so, has a term been negotiated individually? Was the consumer able to change this term in the contract? Or is it a form contract? If so, is this term related to the main object of the contract or the adequate price? If so, are they clear, comprehensible and certainly?
- to review the character of the goods and services which are the main object of the contract;
- to review good faith where the regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer. The good faith as an element of the unfair terms were not implemented to the Slovak Civil Code, but it does not mean that it is not necessary to take it into account in an individual case. On the one hand, the European Union law should be applied

[4] Judgement of the Court of Justice of the EU dated 22.11.2001 in joined cases C-541/99 and C-542/99 Cape Snc v. Idelaservice Srl a Idealservice MN RE Sas v. OMAI Srl

[5] LAZAR, J. et al. Občianske právo hmotné. 1. Bratislava: Iura edition, 2010. p. 53

[6] VOJČÍK, P. et al. Občiansky zákonník. Stručný komentár. Bratislava: Iura edition, 2008. s. 181

[7] Judgement of the Court of Justice of the EU dated 20.6.2000 in joined cases C-240/98 to C-244/98 Oceano Grupo Editorial SA and Rocio Murciano Quintero

[8] Judgement of the Court of Justice of the EU dated 3.6.2010 in case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid

prior the national law; on the other hand each member states took the duty to implement the EU law correct by the EU accession, otherwise it is a serious breaking of the EU law;
- to review all circumstances related to the concluding of the contract;
- to review all terms of this contract or the other contracts that are closely connected with this consumer contract, which the potential unfair term can be dependent from.

The exemplificative enumeration of the potential unfair terms and the general conditions that should be taken into account in an individual case result in the fact, that any term in the contract cannot be considered as unfair per se. For example, a poor term in a consumer contract that any potential dispute between the parties will settle in the arbitration, cannot be considered as unfair per se but only after the consideration of all above mentioned conditions.

The Court of Justice of the EU asks the national courts to take into account these conditions by virtue of office "*the nature and importance of the public interest underlying the protection which Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier*."[9] The new judgments of the Court of Justice of the EU change this obligation of the national courts to consider the unfair character of a term by virtue of office. It is not necessary to consider it while a consumer insists on the application of this terms regardless the potential unfair character: "*The national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application.*"[10] These judgments of the Court of Justice of the EU result in the fact that the burden of decisions on the unfair character of a term in a consumer contract lays down on the national courts. The Court of Justice of the EU distributes the role of the national and supranational courts as follows: "*Article 267 TFEU must be interpreted as meaning that the jurisdiction of the Court of Justice of the EU extends to the interpretation of the concept of unfair term used in Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and in the annex thereto, and to the criteria which national court may or must apply when examining a contractual term in the light of the provisions of that Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case*."[11] If the unfair character of a term were given per se by Council Directive 93/13/EEC, the Court of Justice of the EU would be able to enunciate it unfair character directly. However, there is necessary to consider also the legal and material elements, the national courts have the burden of decision on the unfair character of a term.

The conclusion of this part results in the fact that the unfair character of a term in a consumer contract should be judged according to the legal and material elements of an individual case by the national courts by virtue of office. If a term is considered as unfair, the national court has not to apply it unless the consumer as a contract party opposes that non-application.

3.1 Arbitration clause in the consumer contract

The annex of the Council Directive 93/13/EEC includes terms that can be considered as unfair. One of them (under the point q) is related to the arbitration; the term can be considered as unfair if *excluding or hindering the consumer´s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.* The main aim of this rule is to avoid a risk that the stronger party of a consumer contract inserts the arbitration as exclusively way of the dispute settlement regardless of the consumer´s willingness. This term is usually one the terms stipulated in the general commercial conditions or one of the terms in the form contracts that consumers cannot change. If a consumer signs this contract, he/she gives up the possibility to file a claim at a national general court but he/she usually does not know these consequences of the arbitration clause. Therefore the EU law maker inserted such arbitration term to the potential unfair terms in the annex of this Council Directive.

The arbitration clause is unfair only potentially as well as any other terms named by the Directive. However, it is necessary to find out the legal and material elements of a case, to review the character of the term, if it was negotiated individually and the fact if the consumer opposes the non-application of this term. According to the article 3 (2) of the Council Directive 93/13/ECC *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.* The absence of the individually negotiated arbitration clause does not mean the unfair character of this term per se because the other elements of an individual case should be considered.

According to the § 54 (4r) of the Slovak Civil Code, an arbitration clause is considered as unfair if the consumer is obliged to settle a dispute with the other contract party exclusively at the arbitration court. By other words, the unfair terms are the terms which avoid to the consumer to file a claim at a national general court; it means if a consumer files a claim at the national general court (not at the arbitration court according to the arbitration clause), the national court has a duty to consider a potential unfair character of this arbitration clause by virtue of office. If the court considers this term unfair, it will not apply this term; it means the court decides the case regardless the arbitration clause. This interpretation is supported also by the diction of the above mentioned annex of the Council Directive. The consumer has a right when acting for his/her rights protection at the court that this court should consider the unfair character of the arbitration clause negotiated in favor of the other contract party by virtue of office. And if the clause is unfair, the court should not decide on the lack of its jurisdiction due to arbitration clause and decides the case.

However, the present status of legal regulation and the judgments of the Court of Justice of the EU result in the fact that national courts cannot consider the arbitration clause unfair always and in each case regardless the willingness of the consumer. It is not excluded that a consumer will have just an interest to settle a dispute at the arbitration court. If a national court decides on each arbitration clause between a consumer and other contract party that it is an unfair term and therefore a non-applicable term, this practice could lead to the similar extreme as the forced arbitration clause. The consumer will lose the possibility to choose an arbitration clause voluntarily. This practice is hardly in harmony with the aim of the Council Directive 93/13/EEC as well.

3.2 Arbitration clause from the view of the Court of Justice of the EU and the Slovak law

The Court of Justice of the EU has had more occasions to interpret the unfair character of arbitration clauses. The Court of Justice of the EU has never declared the unfair character of an individual term in a consumer contract but defined clear that it is the role of national courts because there is necessary to consider moreover the legal and material elements of an individual case.

[9] Judgement of the Court of Justice of the EU dated 26.10.2006 in case C-168/05 Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL
[10] Judgement of the Court of Justice of the EU dated 4.6.2009 in case C-243/08 Pannon GSM Zrt. v. Ersébet Sustikné Györfi
[11] Judgement of the Court of Justice of the EU dated9.11.2010 in case C-137/08 VB Pénzügyi Lízing Zrt. v. Ferenc Schneider

It is not a role of the Court of Justice of the EU in the preliminary ruling proceeding according to the 267 TFEU.

The Court of Justice of the EU stipulated that the national courts in the execution proceeding (hereinafter only as execution courts) have a duty to consider an unfair character of the terms in the consumer contracts by virtue of office. In the case Asturcom the Court of Justice of the EU explored "*whether the need to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them requires the court or tribunal responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert his rights and notwithstanding the fact that the domestic rules of procedure apply the principle of res iudicata.*"[12] On the one hand, the Court of Justice of the EU goes out the general legal principles valid also in the international public law and the national legal orders and respects the general principle of res iudicata which considers as an important principle for the maintenance of stability in the law and legal relations regardless the non-application of this principle enables to retrieve breaking of the EU law (e.g. case Kapferer C-234/04; Köbler C-224/01). On the other hand, the Court of Justice of the EU considers the character and meaning of the public interest, which is the starting point of the Council Directive 93/13/EEC: "*Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, article 6 of this Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy*."[13] Within these opinions and application of the effectiveness and equivalence principles the Court of Justice of the EU came to the interpretation of the Council Directive "*a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause*."[14] The key words of this judgement consist in the range of the national law which enables to the execution courts to consider a potential unfair character of an arbitration clause. By other words, an execution court is entitled to review the unfair character of an arbitration clause only in so far as, it can review the legal and material elements of a case according to the similar legal rules of the national law.

According to the Slovak law, a power of an execution court is limited by the § 44 of the Execution Order (law no. 233/1995 Coll.) and the § 45 of law no. 244/2002 Coll. on arbitration proceeding.

The § 44 (2) of the Slovak Execution Order stipulates: "*If the court find out a disharmony between the claim or other documents brought by an executor on the one hand and the law on the other hand, the court refuses this claim*." This rule should be interpreted restrictive; the execution court cannot review the harmony of the material elements of an execution title (decision) issued by a court, an administrative body or an arbitrator. There is more reason for that. The execution title (decision) should be binding also on the execution court as well as the other courts, administrative bodies regardless its disharmony with the law because the Slovak legal order has enough other legal instruments (e.g. appeal) to ensure its harmony with the law. Furthermore, the superior court cannot review the judgment of the inferior courts over the scope of the appeal. If the superior courts are limited to review the execution title by the appeal, the execution courts cannot have much broader power to review all material and legal elements, especially when these execution courts do not have any legal instrument to ensure a remedy.

Within the § 45 of law no. 244/2002 Coll. an execution court has a power to review by virtue of office if an arbitration award lays down a duty to fulfil something what is impossible (general material impossibility to fulfill the arbitration award), forbidden by law (general legal impossibility to fulfill the arbitration award because the award fulfillment will result in a civil or administrative tort or a criminal offence) or contrary to good manners (the fulfillment of arbitration award would not mean a commitment of a tort or criminal offence, but it would be against morality in a society). The Slovak law maker does not want to give a power to the execution courts to review all material elements of arbitration awards. According to this legal diction and the above mentioned judgments of the Court of Justice of the EU, the execution courts are enabled to review the arbitration award only in the range of object that should be fulfilled by a party (mainly consumer); for instance they may not review the arbitration clause because of lack of the material and legal elements of a case, but they can review e.g. an unfair character of default interest rate if it is possible to assess this fact direct from the arbitration award. The § 45 of law no. 244/2002 Coll. gives more power to the execution courts than the § 44 of the Execution Order. The reason can consist in the fact that the law does not ask to be an arbitrator only a person with the legal profession, it can result in the arbitration award laying down a duty to the consumer which is impossible or forbidden by law or contrary to good manners. The law maker gives to the execution courts adequate legal instruments to ensure retrieval, e.g. they can stop the execution proceeding or they can refuse to certificate an executor to realize an execution. But it does not mean that the law maker wants to give a power to the execution courts to be higher instance of the arbitration tribunals. The Supreme Court of the Czech Republic stated that "*the intent of the law making body was to exclude judicial survey of material elements of an arbitration award in the meaning of rightness of the material and legal elements; if should a court carry out to review its material rightness within the proceeding of abolishment of the arbitration award, the legal regulation of the arbitration proceeding will stay without any practical meaning*."[15] The second argument against the extensive interpretation of the § 45 of the law no. 244/2002 Coll. is lack of legal instruments for remedy given to the execution courts. If the law maker wanted to give a power to review also the material elements of arbitration awards, he would give to the execution courts also the adequate legal instruments to realize remedy. The power to stop an execution proceeding or to refuse to certificate an executor to the execution does not lead to any remedy of the material incorrectness of the arbitration award. The only result is to avoid to the beneficiary (other party of the consumer contract) to enforce a right justified to him in the arbitration award by any legal instrument. The stopping of an execution (the second phase of the civil proceeding) of the arbitration award establishes res iudicata for the new execution proceeding and the beneficiary cannot file a claim at the national general court (the first phase of the civil proceeding) because of res iudicata created by the arbitration award, which was not abolished by an execution court because of lack of a power to do it.

The present practice of the Slovak execution courts when refusing to certificate an executor for execution or stopping the execution proceeding because of a pure arbitration clause in a consumer contract creates an unacceptable obstacle for enforcement the justified rights of the beneficiaries. The justified rights cannot be enforced by any other national legal instruments. The beneficiaries have only the possibility to ask for fair trial at the Constitution Court of the Slovak Republic or at the Court for human rights in Strasbourg.

[12] Judgement of the Court of Justice of the EU dated 6.10.2009 in case C-40/08 Asturcom Telecomunicaciones SL v. Cristine Rodríguez Nogueira, point 34
[13] Judgement of the Court of Justice of the EU dated 6.10.2009 in case C-40/08 Asturcom Telecomunicaciones SL v. Cristine Rodríguez Nogueira, point 52
[14] Judgement of the Court of Justice of the EU dated 6.10.2009 in case C-40/08 Asturcom Telecomunicaciones SL v. Cristine Rodríguez Nogueira
[15] Judgment of the Supreme Court of the Czech Republic dated 30.10.2009, no. 33 Cdo 2675/2007

4 The legal and economic impacts of the Slovak execution courts practices

The Slovak execution courts stop the execution proceedings or refuse to certificate an executor to the execution because of arbitration clause in the consumer contracts regardless other material and legal elements of an individual case and willingness of a consumer about the way of dispute settlement. These practices of the Slovak execution courts can cause many legal and economic problems.

The legal problems can be summarized as follows. Firstly, the role of all national courts (including execution ones) is to decide independently and fairly without prejudice to one or another party of the dispute. However, this practice breaks this basic role of justice because the execution courts defend only the rights of a consumer regardless another contract party. They do not care if an arbitration award is also in favor of other contract party or anyway. Practically, the courts become a legal representative of consumers. Secondly, the arbitration proceeding between a consumer and another contract party will not be used and the contract parties will have to settle their disputes only at the national general courts. It would result in higher hard-pressure on the courts and the court proceeding will run longer. By the way, the long-term civil proceedings are the main problem of fair trail even now. Thirdly, this practice should have a negative effect also on the consumers who should be protected. The execution courts do not care on the willingness of a consumer how want to settle the dispute. It could be just a consumer who wants to settle a dispute in the arbitration. The execution courts force the consumers to settle the dispute only at the national general courts what is the same extreme like a forced arbitration clause in a consumer contract.

The economic problems are close joined on the legal ones. Firstly, there can be a negative impact of the state budget. The state is responsible for the human rights; if violated, the state has a duty to compensate its violation. The compensation is usually given in money from the state budget. It is more dangerous in the present economic crisis and the efforts of member states to press down the state debt and the debt of public finance. Secondly, the practice of the execution courts will bring many businessmen up to bankruptcy due to insolvency. It will result to the higher rate of unemployment and loss of capital and investment on the Slovak markets. It will cause the decrease of the living standard what is direct contrary to the objectives of the Council Directive 93/13/EEC and judgment of the Court of Justice of the EU which stated "*moreover, as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory*."[16] Thirdly, it could be a brake for the development of the business activities in Slovakia, because not only the tax policy but also the law enforcement is one of the important factors for doing business as well.

Conclusions

The Slovak execution courts avoid the beneficiary enforcing the fulfillment justified in the arbitration award when stopping the execution or refusing to certificate an executor to the execution because of the pure arbitration clause in a consumer contract. The beneficiaries lose the possibility to enforce the justified rights by any legal way. The interpretation of the § 44 (2) of the Slovak Execution Order and the § 45 of the law on the arbitration proceeding should be realized within the principle of the indirect effect introduced by the Court of Justice of the EU. According to this principle the national law should be interpreted in harmony with the EU law, but the interpretation must not be *contra legem*. Neither the Council Directive 93/13/ECC either the judgments of the Court of Justice of the EU stipulate that any arbitration clause is per se unfair. The Slovak execution courts interpret incorrect not only the rules of this Directive but also the national legal rules (§ 44 (2) of the Slovak Execution Order and § 45 of the law on the arbitration proceeding). The Slovak law maker did not want to give a power to the execution courts to review all material and legal elements of the final decided cases. The role of execution courts is limited to review the fulfillment justified by the arbitration award only from the view of a potential general material or legal impossibility or a potential collision with the good manners. However, any broader power to review the arbitration awards by the Slovak execution courts can lead to the break of the human right for fair trial guaranteed by the article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms.

[16] Judgement of the Court of Justice of the EU dated 26.10.2006 in case C-165/08 Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL, point 37

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