Karin Sein
Docent of Civil Law
University of Tartu

Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice

1. Introduction

The jurisdiction and arbitration clauses contained in consumer contracts can significantly limit the constitutional right of consumers to have recourse to the courts for protecting their rights. This particularly applies if such a clause is contained in the standard terms of the contract prepared by the other party, as a result of which the consumer cannot influence the substance of the contract. In such cases, the consumer has in fact been forced to agree that the disputes arising from the contract will be settled in the arbitral tribunal or court chosen by the seller or supplier if the consumer wishes to acquire the desired goods or service. However, such contracts are relatively frequent in the practice of the European countries, which has given rise to the judgements of the European Court of Justice such as *Oceano Grupo*[*1], *Mostaza Claro*[*2], *Asturcom*[*3], *Pannon*[*4] and *Pénzügyi Lízing*.[*5]

The objective of this paper is to analyse how the European Court of Justice has sought to protect consumers against the jurisdiction and arbitration clauses contained in standard terms and what duties would arise from the above-mentioned judgements for the judges of Member States, including Estonia. The paper demonstrates that although the European Union legislator does not have general competence to regulate the civil proceedings of the Member States, the judgements of the European Court of Justice examined have considerable impact on the civil proceedings of the Member States, including the principles of procedural autonomy and the adversary principle of the parties.

---

1 Case 27.6.2000, joined cases C-240/98–C-244/98, *Océano Grupo Editorial and Salvat Editores*. – ECR 2000, p. I-4941.

2 Case 26.10.2006, C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL*. – ECR 2006, p. I-10421.

3 Case 6.10.2009, C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*. – ECR 2009, p. I-9579.

4 Case 4.6.2009, C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*. – ECR 2009, p. I-4713.

5 Case 9.11.2010, C-137/08, *Pénzügyi Lízing Zrt v. Ferenc Schneider*. – OJ C 13, 15.1.2011, p. 2.

2. Jurisdiction and arbitration clauses as unfair contract terms

There is no general prohibition in Estonian law on arbitration or jurisdiction clauses in consumer contracts. However, according to §104 (3) 1) of the Code of Civil Procedure[*6] (hereinafter referred to as the CCP), the agreement on jurisdiction between the business and the consumer is valid only if concluded after the arising of the dispute. Section 105 of the CCP still enables the court to also accept a jurisdiction agreement concluded before the arising of the dispute on the precondition that the consumer (defendant) responds to the action without contesting jurisdiction and also in cases where the defendant does not respond to the action but participates in a court session without contesting jurisdiction. Yet, Estonian law, somewhat surprisingly, imposes on arbitration agreements only the requirement of a written form (CCP §719 (2))[*7], but does not prohibit entry into them before the arising of a dispute.

A legal situation is considerably more complicated if the agreement on jurisdiction or arbitration is contained in standard terms. The issues related to the standard terms contained in consumer contracts are governed by Council Directive 93/13/EEC on unfair terms in consumer contracts[*8] (hereinafter referred to as the Directive). Article 3 (1) of the Directive provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Article 3 (3) of the Directive refers to the Annex to the Directive that contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair'[*9] and according to its clause 1 q, a term which has the object or effect of excluding or hindering the consumer's right to take legal action, particularly by requiring the consumer to take disputes exclusively to arbitration, can be regarded as unfair.

The provisions of Directive 93/13/EEC have been harmonised in Division 2 of Chapter 2 of the Law of Obligations Act[*10] (hereinafter referred to as the LOA). According to LOA §42 (1) and (3) 10), a standard term is unfair, hence void, if it deprives the other party of the opportunity to protect his rights in court or unreasonably hinders such opportunity from being exercised. It cannot be unambiguously inferred from the wording of the provision whether and what kind of agreements on arbitration and jurisdiction should be considered as unfair according to Estonian law, while comments on the Law of Obligations Act do not ensure full clarity either.[*11] Here we have to note that the European Court of Justice is not competent to decide on the unfair nature of a particular arbitration or jurisdiction clause[*12], but this can only be done by a national court that has to take into account national legislation and the circumstances of the dispute when forming its opinion, while also observing the general criteria developed by the European Court of Justice for assessing the unfairness of standard terms.[*13]

Opinions vary across different Member States about whether and on what conditions the arbitration clause contained in the standard terms must be considered as unfair for the purposes of the Directive. For example, in German law, the arbitration clauses contained in consumer contracts are not regarded *a priori* as unfair but must be assessed against, e.g., the distance of the arbitral tribunal from the residence of the consumer and the cost of the procedure for the consumer.[*14] In Spanish law, however, submission to arbi-

6 Tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197; RT I, 30.12.2010, 2 (in Estonian).

7 Failure to comply with a formal requirement does not influence the validity of an agreement if the parties agree to the resolution of the dispute by an arbitral tribunal, CCP §719 (3).

8 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 95, 21.4.1993, p. 29.

9 Case 1.4.2004, C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, paragraph 20. – ECR 2004, p. I-03403.

10 Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 4.2.2011, 2 (in Estonian).

11 P. Varul, I. Kull, V. Kõve, M. Käerdi. Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations Act I. Commented Edition). Tallinn: Tallinn 2006, p. 156 (in Estonian). Neither does the Estonian Constitution discuss the question whether and to what extent a contract may limit the constitutional right of individuals to have recourse to the courts for the protection of their rights. See E.-J. Truuväli *et al.* Eesti Vabariigi põhiseadus: Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented edition). 2nd, revised edition. Tallinn: Juura 2008, p. 162 *ff.* (in Estonian).

12 *Mostaza Claro* (Note 2), paragraph 22; *Pénzügyi Lízing* (Note 5), paragraphs 43, 44.

13 *Freiburger Kommunalbauten* (Note 9), paragraphs 21, 22; *Pénzügyi Lízing* (Note 1), paragraph 44.

14 K. Hilbig. Absoluter Verbraucherschutz bei unzulässigen AGB-Schiedsvereinbarungen? – Zeitschrift für Schiedsverfahren 2010, p. 76. For the law of other Member States, see, e.g., N. Reich. More clarity after 'Claro'? Arbitration clauses in consumer contracts as an ADR (alternative dispute resolution) mechanism for effective and speedy conflict resolution, or as 'deni de justice'? – European Review of Contract Law 2007/3, pp. 44–49.

tration other than consumer arbitration, except in the case of arbitration bodies established by statutory provision in respect of a specific sector or circumstances is considered unfair.*[15]

As mentioned above, there is no universal position in Estonian law on when an arbitration clause contained in standard terms of a consumer contract can be regarded as a unfair standard term for the purposes of LOA §42 (3) 10). Neither have such standard terms become common in practice in Estonia, yet. As the first ones are already in place, sooner or later we must develop our own position on this issue.

The author agrees with Advocate General Trstenjak, delivering her opinion in the *Asturcom* case, that there are serious doubts about the independence and neutrality of the courts of arbitration since arbitrators may possibly have a personal interest in conducting the arbitration proceeding and hence disregarding the voidness of the arbitration clause.*[16] As the remuneration of arbitrators depends on the conducting of arbitration proceedings as a rule, the arbitrators need not always be willing to establish the voidness of the arbitration clause and refuse to conduct the proceedings. Also, the basis for solving a dispute in arbitration proceedings is the fact that the parties have, of their free will, given up on the adjudication of the matter in national court and submitted the settlement of disputes to the competence of the court of arbitration. The development of the consumer's free will in the case of standard terms is rather doubtful because of the unequal negotiation position of the parties. Besides these problems, unlike, e.g., in German law*[17], the decisions of national arbitral tribunals existing on a permanent basis in Estonia are automatically enforceable (CCP §753 (1)) and hence are subject to the supervision of the national judicial system only on the consumer's request.*[18] Since according to European law—as indicated above—the unfair nature of standard terms must be *inter alia* assessed in the context of domestic law, the author is of the opinion that the latter fact serves as a reason to consider the arbitration clauses contained in standard terms in Estonian law usually as unfair and hence void. A contrary position would seriously undermine the objective set out in the Directive—to effectively protect consumer against unfair standard terms.

It is somewhat more difficult to assess the unfair nature of jurisdiction clauses as here the consumer is not deprived of the opportunity to have recourse to the national judicial system but the consumer's opportunity to settle the dispute in the court prescribed by law is simply precluded or limited. Although according to Estonian procedural law, the jurisdiction clause contained in standard terms is usually void (CCP §104 (3) 1))*[19], it need not be the same way in the law of other Member States and this has given rise to several references for preliminary ruling lodged with the European Court of Justice. Emphasising that the assessment of the unfair nature of a specific provision lies with the competence of courts of the Member State, the European Court of Justice has still concluded that, e.g., a standard term contained in an agreement entered into between a consumer and undertaking, which confers the jurisdiction for the dispute only to the court in the territorial jurisdiction of which the seller or supplier has its principal place of business could be regarded as unfair.*[20] Such a clause compels the consumer to accept that the dispute can be settled only in a court that may be located far from the consumer's place of residence, which in turn complicates the appearance of the consumer before the court. In the case of disputes concerning limited amounts of money, the costs relating

15 *Mostazo Claro* (Note 2), paragraph 11. E.g., in French law, arbitration agreements are not allowed in consumer contracts (see N. Reich (Note 14), p. 47) and in Austrian law, the arbitration clauses contained in standard terms are prohibited (see K. Hilbig (Note 14), p. 75).

16 Opinion of Advocate General Verica Trstenjak in Case 14.5.2009, C-40/08, *Asturcom Telecomunicaciones SL gegen Cristina Rodríguez Nogueira*. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0040:DE:HTML (13.4.2011).

17 According to §1060 (1) of the German Code of Civil Procedure (ZPO), an arbitral award can be enforced only if it has been declared enforceable by court.

18 The CCP does not explain the notion of 'permanent arbitral tribunals' and does not establish any criteria for an arbitral tribunal to be considered permanent. Perhaps all the arbitral tribunals that are not ad hoc arbitral tribunals can be considered as permanent arbitral tribunals, hence in principle also an arbitral tribunal having one arbitrator, existing with, e.g., an undertaking, which adjudicates a couple of times a year.

19 A regulation analogous to that of Estonia also applies in German law, for details, see C. Meyer. Missbräuchliche Gerichtsstandvereinbarungen in Verbraucherverträgen: Anmerkung zu EuGH Urteil Pannon. – Zeitschrift für Gemeinschaftsprivatrecht 2009, pp. 221–223.

20 *Pannon* (Note 4), paragraph 44; the same also in *Oceano* (Note 1), paragraph 24. For details, see T. Pfeiffer. Prüfung missbräuchlicher Klauseln von Amts wegen (Gerichtsstand) – Günstigkeitsprinzip nach Wahl des Verbrauchers. – Neue Juristische Wochenschrift 2009, pp. 2367–2369. It must be noted in addition that according to Article II.-9:409 of the Draft Common Frame of Reference, such agreements on jurisdiction are unfair standard terms. According to the DCFR, this is the only standard term included in the black list or automatically void; in the case of all other standard terms, their unfair nature is only presumed, see DCFR Article II.-9:410.

to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence.[*21] In the context of Estonian law, it may be important to consider these guidelines of the European Court of Justice in the cases in which the agreement on jurisdiction was indeed reached after the arising of the dispute but still on the standard terms drafted by the operator (e.g., the operator has prepared an annex to the contract after the arising of the dispute, containing an agreement on jurisdiction described above).

At the same time, it cannot be precluded that the consumer does desire the settlement of the dispute in the (arbitral) tribunal prescribed by the standard terms, and in such a case, it would be unreasonable to deny the consumer this option from the point of view of procedural economy. That is why in its judgement on *Pannon*, the Court of Justice assumed the position that the court had to inform the consumer about the invalidity of such a clause and ask whether the consumer wished to settle the dispute in that court regardless thereof.[*22] Taking into account the principle of interpretation in conformity with the Directive[*23], the mere participation of the consumer in the proceeding (cf. CCP §105) is not enough to approve jurisdiction but it is necessary that the court first explain that the standard term prescribing jurisdiction is void and hence the consumer is not required to participate in the proceedings. It is only when the consumer participates in the proceeding regardless of this that the national court may proceed with the discussion of the subject of the matter.

3. Duties of the court in establishing unfairness of standard term

The European Court of Justice has time after time expressed the opinion that the national court may assess the unfairness of standard terms *ex officio*.[*24] In later judgements it has already been established that the national court does not only have the right thereto but also an obligation. Hence, the European Court of Justice observed in the *Pannon* case that the national court had to examine the possible unfairness of the jurisdiction agreement *ex officio* even if the consumer had not relied on that[*25] while the position was reasserted in the case *Pénzügyi Lízing*.[*26] This also applies in the case in which the court assesses if the case falls within its jurisdiction or not. The point of departure of Estonian law is, in principle, similar, as according to CCP §75 (1), the court must verify the jurisdiction of the matter *ex officio* anyway.[*27] The Supreme Court of Estonia has repeatedly stressed that the court must examine the validity of the standard terms even if the parties have not relied on it.[*28]

A distinction must be made between the above question and the question of whether the court must *ex officio* also examine whether an agreement on arbitration or jurisdiction is a standard term at all (which may not be clear at all if the contract contains just a few clauses). In other words: if the consumer does not at all during the proceedings rely on the fact that standard terms have been imposed on him, does the court still have to examine that issue of its own motion? This question was answered in the case *Pénzügyi Lízing*.[*29] Here the court, referring for the preliminary ruling, asked the European Court of Justice whether the national court was required to examine, of its own motion, the unfairness of a contractual term where it had available to it all the legal and factual elements necessary for the task, or the examination of unfairness of a contractual term also meant that the national court was obliged to undertake, of its own motion, an investigation with a view to establishing the factual and legal elements necessary to assess whether a term is unfair. More precisely, the court requested from the European Court of Justice an answer to the question

21 *Oceano* (Note 1), paragraph 22.

22 *Pannon* (Note 4), paragraphs 33, 35.

23 For this, see, e.g., case 13.11.1990, C-106/89, *Marleasing*. – ECR 1990, p. I-4135, paragraph 8; ALCSCd, 16.6.2010, 3-3-1-36-10, paragraph 19.

24 See *Oceano* (Note 1), paragraph 29; Case 21.11.2002, C-473/00, *Codifis*, paragraph 38. – ECR 2002, p. I-10875.

25 *Pannon* (Note 4), paragraph 32.

26 *Pénzügyi Lízing* (Note 5), paragraph 56.

27 It is perhaps important to emphasise that this also applies if the case derives from an order for payment procedure, but the consumer lodges a general objection without separate contestation of jurisdiction.

28 See CCSCd, 3-2-1-155-05, paragraph 19; 3-2-1-2-08, paragraph 13; 3-2-1-56-08, paragraph 13; 3-2-1-2-11, paragraph 12.

29 *Pénzügyi Lízing* (Note 5), paragraph 25.

that if the national court itself observed, where the parties to the dispute had made no application to that effect, that a contractual term was potentially unfair, could it undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to that examination where the national procedural rules permitted that only if the parties so requested?

When answering the question, it is necessary to first recall the principle of procedural autonomy of the Member States, i.e., that outside a few special cases, the European Court of Justice does not have the general competence to regulate national civil procedures. Traditionally, the adversary principle and the principle of passivity of the court apply to the civil procedures of the Member States, i.e., the parties determine the extent of claim as well as the circumstances and evidence serving as its basis.[*30] The European Court of Justice has recognised the principle of passivity of the court in the *van Schijndel* judgement, establishing that the court could act of its own motion in a civil suit only in special cases if required by public interest.[*31]

In the case *Pénzügyi Lízing*, however, the European Court of Justice arrived at the conclusion that in order to ensure the effectiveness of consumer protection 'in the exercise of the functions incumbent upon it under the provisions of the Directive, the national court must ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of that Directive'[*32]. Hence, the European Court of Justice assumed a position that the national court was required e*x officio* to examine if standard terms were concerned. The Court stressed that the national court had such an obligation also in case the national procedural law provided otherwise.[*33] Hence, at this point, the court can no longer proceed from the request of the parties and the adversary principle is replaced by the inquisitorial principle that is in fact not characteristic of civil procedure. Such an approach is not actually new to Estonian judicial practice, although the position of the Supreme Court has varied on this issue over the years. The initial prevailing opinion in judicial practice was that the court was obliged to examine if a term could be a standard term.[*34] In 2006, the Supreme Court adopted a contrary position, stating that 'the party who wishes that the court apply to the terms of the contract the regulation of the standard terms in the Law of Obligations Act, must pursuant to LOA §35 (1) and (2) plead and prove the circumstances based on which the term of the contract can be qualified as a standard term according to LOA §35 (1)'.[*35] It was only recently that the Supreme Court returned, emphasising that 'upon the reopening of the matter, the court must of its own motion assess also whether the above-mentioned contract clauses are standard terms'[*36]. Hence, the present position of the Supreme Court on this issue coincides with that of the European Court of Justice.[*37]

At least to date, the European Court of Justice has not adopted a position whether the obligation to examine *ex officio* the unfairness of standard terms extends to arbitral tribunals. In legal literature, the unwillingness of the European Court of Justice to express its opinion about this issue has been ascribed to the fact that it is an extremely sensitive issue from the point of view of legal policy relating to the interrelationships between European Union law, national procedural law and arbitration law.[*38] The author thinks that it would be reasonable for arbitral tribunals to also observe the principles provided in the judgements of the European Court of Justice to preclude—as will be soon demonstrated—the possibility to assess the unfairness of arbitration clauses and as a result annul the judgements of arbitral tribunals later on.

30 See for details M. Ebers. From Oceano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata. – European Review of Private Law 2010/4, pp. 825–828.

31 See case 14.12.1995, joined cases C-430-431/93, *van Schijndel*. – ECR I-4705, p. 21.

32 *Pénzügyi Lízing* (Note 5), paragraphs 49, 56.

33 *Pénzügyi Lízing* (Note 5), paragraph 51. The excess interference by the Court of Justice in the procedural autonomy of the Member States has also been criticised. See T. Pfeiffer. EuGH: Kompetenzen des EuGH bei der Auslegung der Klauselrichtlinie und die Pflicht der nationalen Gerichte zur Amtsermittlung. Kommentierte BGH-Rechtsprechung Lindenmaier-Möhring (LMK) 2010, 311868.

34 See CCSCd, 3-2-1-59-05, paragraph 17; 3-2-1-140-05, paragraph 12. A similar position is upheld in the Comments on the Law of Obligations Act (Note 10), pp. 126–127.

35 See CCSCd, 3-2-1-150-06, paragraph 17; the same position was repeated in decision 3-2-1-45-07, paragraph 11.

36 See CCSCd, 3-2-1-2-11, paragraph 12.

37 The position of German law has been rather similar. It is namely held that in principle the consumer has to plead and prove that it was a standard term; yet the obligation is considered fulfilled already after the terms of the contract have been presented to the court in a printed or otherwise reproduced form. See Münchener Kommentar zum Bürgerliches Gesetzbuch. Band 2. Schuldrecht Allgemeiner Teil. Kommentaator: E.-M. Kieninger. 5. Aufl. 2007, §305, margin No. 43.

38 C. Mak. Judgement of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v. Cristina Rodrigues Nogueira*, Case C-40/08. – European Review of Contract Law 2010/4, pp. 443–444.

4. Possibility to assess the unfairness of arbitration clauses in post-judgement stage

As a result of the request for preliminary ruling submitted by two Spanish courts, the European Court of Justice had to decide whether it could derive from European Union law that the voidness of unfair arbitration clauses could also be taken into account after the arbitral tribunal had made an award in the case. Moreover, could such an opportunity exist even if the national procedural law of the Member States did not allow it? And if yes, then if and under what circumstances should the court annul an award made by such an arbitral tribunal?

The case of *Mostaza Claro* gave rise to the question whether in a situation in which the consumer had not at all participated in the arbitration proceedings, but later on submitted an action for the annulment of the award of the arbitral tribunal, a court could *ex officio* assess the unfair nature of the arbitration clause and annul the award of the arbitral tribunal as a result. In this case, the settlement of disputes related to the contract was subordinated to an arbitral tribunal in the standard terms of a mobile telephone contract entered into with the consumer. The consumer presented her objections to the action in the arbitral proceedings but did not contest the competence of the arbitral tribunal or claim the unfairness of the arbitration agreement. The arbitrator found against her. After that, the consumer contested the arbitration decision before the court, applied for the annulment of the arbitration award and for the first time claimed that the arbitration agreement had served as an unfair standard term and thus the arbitration agreement had been void from the start.[*39] The court that had received the action for annulment referred to the European Court of Justice for a preliminary ruling and posed the following question:

> May the protection of consumers under Council Directive 93/13/EEC [...] require the court hearing an action for annulment of an arbitration award determine whether the arbitration agreement is void and to annul the award if it finds that the arbitration agreement contains an unfair term to the consumer's detriment, when that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings?[*40]

The European Court of Justice stressed that in the case of standard terms, the consumer was in a weaker position vis-à-vis an operator and such an imbalance might only be corrected by positive action unconnected with the actual parties. It was the nature and importance of public interest underlying the protection which the Directive conferred on consumers that justified, according to the European Court of Justice, that the national court could determine of its own motion the unfair nature of the term and compensate this way for the imbalance which existed between the consumer and the seller or supplier.[*41] As a result, the European Court of Justice assumed the position that the national court seised of an action for annulment of an arbitration award had to determine whether the arbitration agreement was void and annul that award where that agreement contained an unfair term, even though the consumer had not pleaded that invalidity in the course of arbitration proceedings, but only in that of the action for annulment.[*42]

The Estonian court must also consider the positions provided in the *Mostaza Claro* judgement when interpreting CCP §751 (1) 2). Namely, according to CCP §751 (1) 2), the court shall annul a decision of an arbitral tribunal made in Estonia if the party proves that the arbitration agreement is null and void pursuant to the laws of Estonia or another state, based on whose law the parties agreed to assess the validity of the arbitration agreement. Hence, the possible unfairness of an arbitration agreement contained in standard terms in accordance with LOA §42 (3) 10) must be assessed also when deciding on the action for annulment of the decision of an arbitral tribunal. However, it is questionable if indeed the consumer should prove the voidness of an arbitration clause, as it derives from the wording of CCP §751 (1) 2), or the duty of the court to identify the voidness of standard terms *ex officio* deriving from the earlier judgements of the

39 *Mostaza Claro* (Note 2), paragraphs 16–18.

40 *Ibid*., paragraph 20.

41 *Ibid*., paragraphs 25, 26, 38.

42 *Ibid*., p 39. The author supposes that the unfairness of an arbitration clause should be taken into account also when a consumer has recourse to the courts against an operator and the operator contests the competence of the court, relying on the existence of the arbitration clause. However, N. Reich (Note 14), p. 43, holds a different opinion.

European Court of Justice*[43] should be recognised here as well. The author supports approval of the latter position. This is also supported by the conclusion of the *Mostaza Claro* judgement, according to which the court 'must determine whether the arbitration agreement is void'. Hence, CCP §751 (1) 2) is obviously not in accordance with European Union law in that part and, based on the principle of interpretation in conformity with the directive, the provision should be interpreted so that in such a situation as set out in the provision, the court determining the voidness of the arbitration award must determine *ex officio* whether the arbitration agreement contained in standard terms is void.

While the *Mostaza Claro* case arose from the problem that the consumer did not rely on the voidness of the arbitration clause during arbitral proceedings, the behaviour of the consumer was even more passive in the *Asturcom* case. Namely, throughout the arbitration proceedings, the consumer had not expressed any objection to the competence of the court of arbitration or the claim lodged against her. The consumer did not contest the arbitration award in a national court during the period prescribed for that in Spanish law either. Hence, the arbitration award entered into force and was submitted to a national court to be declared enforceable. When deciding on the enforceability of the arbitration award, the court had the question of whether, based on the Directive on unfair terms, it could determine of its own motion whether it was an unfair standard term to the detriment of the consumer and if yes, if it could annul the arbitration award on these grounds. To obtain an answer, the court referred the matter for preliminary ruling to the European Court of Justice.*[44]

This case saw the collision of three important principles that are also recognised by the European Court of Justice: the principle of protection of consumers, the principle of efficient arbitration proceedings and the principle of *res judicata*, and the European Court of Justice had to seek a reasonable balance between these principles. When expressing its opinion, the European Court of Justice referred to its previous judicial practice, according to which the Member States are generally free to apply national procedural rules (principle of procedural autonomy of the Member States), but the freedom is restricted by a) the principle of effectiveness and b) the principle of equivalence.*[45] The principle of effectiveness means that the national procedural order of a Member State may not render the exercise of individual rights conferred by European Union law impossible or excessively difficult. According to the principle of equivalence, the national procedural rules of a Member State must not place individuals in a less favourable situation upon exercising the individual right arising from European Union law than those governing domestic actions.*[46] The European Court of Justice noted that Spanish procedural rules were in line with the principle of effectiveness but identified an opportunity to allow for the limited examination of the validity of arbitration clauses via the principle of equivalence.

The European Court of Justice namely established that pursuant to the principle of equivalence, it was required that the conditions of applying the legal provision of the European Union arising from national law would not be less favourable than the conditions of the application of the national provisions of the same ranking of its own motion. The Court further stated that Article 6 of the Directive on unfair terms served as a provision that was extensively based on public interest (protection of consumers against unfair terms), and that is why Article 6 of the Directive had to be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.*[47] Hence, Article 6 of the Directive, pursuant to which the Member States must ensure that unfair terms are not binding on the consumer, was promoted to the rank of public policy (*ordre public*).

The procedural laws of many Member States provide for the possibility of annulment of arbitration awards provided that the arbitration award is in conflict with the rules of public policy but not all the Member States allow for its assessment *ex officio*.*[48] Against this background, the European Court of Justice established the following rule: inasmuch as the national court or tribunal seised of an action for enforce-

43 For this, see Chapter 3.

44 *Asturcom* (Note 3), paragraphs 20–27.

45 *Mostaza Claro* (Note 2), paragraph 24; *Asturcom* (Note 3), paragraph 38.

46 *Mostaza Claro* (Note 2), paragraph 24. For the principles, see—particularly in the context of the Asturcom case—H. Schebesta. Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom. – European Review of Private Law 2010/4, pp. 857–859 and 877–878.

47 *Asturcom* (Note 3), paragraphs 49, 52.

48 This is disputable, for example, in Spanish law that is why the Spanish court finally decided to declare the arbitration award enforceable. See C. Mak (Note 38), pp. 446–447.

ment of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair standard term. The Court emphasised that the national court or tribunal was also under such an obligation where, under the domestic legal system, it had a discretion, i.e., right to consider of its own motion whether such a clause was in conflict with national rules of public policy.*[49]

Hence, there cannot be an unambiguous answer to the question whether a court determining the enforceability of an arbitration award can avoid declaring the arbitration award enforceable because of the unfair nature of the arbitration award based on European Union law and the answer will depend on the national procedural law of the Member State. If the national procedural law of a Member State does not allow for the annulment of an arbitration award that is in conflict with national rules of public policy of the court's own motion, the court cannot do that based on the provisions of consumer protection of the European Union either.*[50] In an opposite case, the national court must annul the arbitration award.*[51]

According to CCP §751 (2) 1), the court shall annul a decision of an arbitral tribunal based on the request of a party or at the court's initiative if the court establishes that pursuant to Estonian law, the dispute should not have been adjudicated by an arbitral tribunal. The court has a similar right if the decision of the arbitral tribunal is contrary to Estonian public order or good morals (CCP §751 (2) 2). According to CCP §753 (2), the court shall dismiss a petition for declaring a decision of an arbitral tribunal to be subject to enforcement and shall annul the decision if a cause for annulment of the decision of the arbitral tribunal exists. Thus, considering the rule provided in the *Asturcom* case and the principle of interpreting in conformity with the Directive, an Estonian court must refrain from declaring the decision of an arbitral tribunal enforceable and annul the decision of its own motion. The positions provided in the *Asturcom* and *Pénzügyi Lízing* cases could give grounds to infer an even more extensive right of examination the court: namely, upon the receipt of a request for the enforcement of an arbitration award the court must *ex officio* examine whether it was a consumer dispute*[52], whether the arbitration clause was null and void and if yes, annul the arbitration award of its own motion. According to CCP §753 (1), this can be considered only in the case of a decision by a non-permanent arbitral tribunal, since a decision made in a proceeding of an arbitral tribunal operating in Estonia on a permanent basis is subject to recognition and enforcement without separate recognition and declaration of enforceability by the court.

5. Conclusions

Although the European Court of Justice can interpret general criteria used by the Community legislature in order to define the concept of unfair terms, the European Court of Justice is not competent to decide which arbitration and jurisdiction clauses can be regarded as unfair standard terms in a particular case. This falls within the competence of a national court that must consider, *inter alia*, the circumstances of a particular case and the context of national law upon the assessment of a standard term. The author supports the opinion that in the context of Estonian law, a standard term that deprives the consumer of the opportunity to have recourse to the courts and instead forces the consumer to settle potential disputes in an arbitral tribunal, must be generally regarded as unfair according to LOA §42 (3) 10) and hence void. The question of regarding an jurisdiction agreement entered into with the consumer as unfair does not play an important role in Estonian law since the agreements on jurisdiction contained in standard terms are, as a rule, void in consumer contracts according to CCP §104 (3) 1) because they were entered into before the arising of the dispute.

In the cases discussed in the paper, the European Court of Justice has significantly interfered with the principle of procedural autonomy and the adversary principle of the Member States. Namely, the European Court of Justice has emphasised several times that in certain cases the national court has to abandon its

[49] *Asturcom* (Note 3), paragraphs 53, 54.

[50] M. Ebers (Note 30), pp. 840, 846.

[51] *Asturcom* (Note 3), end of paragraph 59.

[52] This could be inferred, *inter alia*, from the prerequisite provided in paragraph 32 of the *Pannon* case: 'where it has available to it the legal and factual elements necessary for that task', which later in the *Pénzügyi Lízing* case were defined as the obligation of the court to examine of its own motion if the term falls within the scope of the Directive, see Chapter 3 above.

passive role and examine certain circumstances of its own motion, as it would otherwise be impossible to achieve the objective of consumer protection provided in the Directive on unfair terms. Hence, a national court has a duty to *ex officio* verify whether the terms of the contract are standard terms. The court must also assess the possible unfairness of standard terms of its own motion. A national court is under certain circumstances obliged to annul an arbitration award made on the basis of an unfair arbitration clause and do this even though the consumer has not contested the competence of the arbitral tribunal during the arbitration proceedings.

The arbitral tribunals should also observe the principles provided in the judgements of the European Court of Justice in order to avoid annulment of arbitration awards later on. This in turn means that it would generally be reasonable for operators to avoid using arbitration clauses in standard contracts entered into with consumers, and negotiate those terms individually.