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ECJ Case C 40/08 *Asturcom* – EU Unfair Terms Law Confirmed as a Matter of Public Policy

BERND ULRICH GRAF*, ARTHUR E. APPLETON**

In the 2006 *Mostaza Claro* case,¹ the European Court of Justice (“ECJ”) held that Directive 93/13 on unfair terms in consumer contracts² provides a defence against arbitral awards in an action for annulment, even when the consumer failed to plead the invalidity of the arbitration agreement containing an unfair term during the previous arbitration proceeding. While emphasizing the essential and mandatory character of Directive 93/13, the ECJ did not clearly indicate in *Mostaza Claro* whether the Directive rises to the level of public policy for purposes of setting aside or refusing to enforce an arbitral award.³ In the recent *Asturcom* case,⁴ the ECJ clarified the public policy effects of Directive 93/13.

The facts again concerned a mobile phone subscription contract between a Spanish company and a Spanish resident consumer. The mobile phone company, *Asturcom Telecomunicaciones SL* (“*Asturcom*”), obtained an arbitral award in April 2005 ordering the consumer to pay certain outstanding amounts. The consumer did not participate in the arbitration proceeding and did not bring an action for annulment of the award. The arbitral award became final. When *Asturcom* sought to enforce the arbitral award in October 2007, the Spanish court seized with the enforcement proceedings considered the agreement to arbitrate to be an unfair term, due in part to the distant seat of the arbitration which would have required that the consumer spend more money to travel to the place of arbitration than was at issue in the dispute.⁵ Taking the position that Spanish national law does not permit a related review of the final arbitral award, the Spanish court asked the

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¹ Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I 10421, 26 October 2006 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0168:EN:HTML>), (“*Mostaza Claro*”).

² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

³ See our detailed case comment Graf/Appleton, “*Elisa María Mostaza Claro v Centro Móvil Milenium SL*: EU Consumer Law as a Defence against Arbitral Awards - ECJ Case C-168/05”, *ASA Bull.* 1/2007, p. 48.

⁴ Case C 40/08 *Asturcom Telecomunicaciones SL v Maria Cristina Rodríguez Nogueira* of 6 October 2009 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0040:EN:HTML>), (“*Asturcom*”).

⁵ See *Asturcom* at para. 25.

ECJ for a preliminary ruling as to whether in light of Directive 93/13 a national court has “to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer.”⁶ The ECJ ruled in *Asturcom* that:

“Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that 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.**” (Emphasis added.)

The ECJ’s reasoning contains general guidelines going beyond the foregoing ruling.

***Res judicata* limits under EU law**

The ECJ distinguished the present case from *Mostaza Claro*, since due to the consumer’s inaction the *Asturcom* arbitral award had become final with the force of *res judicata* under Spanish law. The relationship between national *res judicata* rules and EU law is not a new issue, and the ECJ referred to its established case law acknowledging the importance of the *res judicata* principle for “the stability of the law and legal relations” and detailing the limits that EU law poses on national *res judicata* rules under the ECJ-framed principles of effectiveness and equivalence.⁷

Under the “principle of effectiveness”, national *res judicata* rules must not “make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.”⁸ In this respect, in the interests of legal certainty ECJ case law permits reasonable time-limits for bringing

⁶ See *Asturcom* at para. 27.

⁷ See *Asturcom* at paras. 36-38, referring to Case C 234/04 *Kapferer* [2006] ECR I 2585, paras. 20, 22, and Case C 2/08 *Fallimento Olimpiclub* [2009] ECR I 0000, paras. 22, 24.

⁸ *Id.*

proceedings.⁹ In the case at hand, Spanish law on challenging arbitral awards provided a time limit of two months that started to run from the date of notification of the arbitral award. According to the ECJ, such a time-limit gives the consumer sufficient time to react and exercise any rights which the consumer derives from Directive 93/13 and thus is consistent with the principle of effectiveness.¹⁰

Under the “principle of equivalence”, the conditions imposed by national law under which the courts may apply a rule of Community law upon their own motion must not be less favourable than those governing the application of rules of domestic law of the same ranking.¹¹ It is in this context that the ECJ, after referring to its pronouncements in *Mostaza Claro* on the mandatory and essential character of Directive 93/13 as shown by Articles 6 and 3(t) of the Directive, confirmed that Article 6 of Directive 93/13, which provides that unfair terms must not be binding on consumers, is a rule that ranks as public policy:

“...in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the 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**.”¹² (Emphasis added.)

Thus, where a national court under domestic rules of procedure may review a final arbitral award in order to assess upon its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to engage in a *sua sponte* review to determine whether the arbitration clause is unfair under Directive 93/13.¹³

⁹ Cf. *Asturcom* at para. 41 with references to Case 33/76 *Rewe Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para. 5; Case C 261/95 *Palmisani* [1997] ECR I 4025, para. 28; and Case C 2/06 *Kempter* [2008] ECR I 411, para. 58.

¹⁰ See *Asturcom* at paras. 44-48. While at para. 47 the ECJ also refers to the consumer’s “total inertia” not having to be made up by the courts, this does not add anything to its reasoning based on the length and start of the time-limit.

¹¹ *Asturcom* at para. 49.

¹² *Asturcom* at para. 52. Article 6(1) of Directive 93/13 provides as follows: “Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

¹³ See *Asturcom* at paras. 53 et seq. In its discussion, the ECJ also refers to Case C 243/08 *Pannon GSM* of 4 June 2009, which established at para. 32 that a national court’s role under Directive 93/13 is “not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task, including when it is assessing whether it has territorial jurisdiction.” (emphasis added) In *Pannon GSM* the ECJ held that an exclusive jurisdiction clause selecting the

Consequences of finding an unfair term

The Advocate General proposed that the national court “must reject an application for enforcement of a final arbitration award made in the absence of the consumer and annul that award” if the arbitration clause contained an unfair term.¹⁴ The ECJ decision is less intrusive and leaves the consequences up to national law, provided that the unfair term is not binding on the consumer: “... 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.”

Conclusion

For all practical purposes, *Asturcom* establishes that the enforcement of a final arbitral award must not be granted where domestic law allows for a public policy review of final arbitral awards and the national court in its review finds that the arbitration clause is unfair under Directive 93/13. The national court must undertake a *sua sponte* review pursuant to EU law, even if national law only provides for discretionary review by the court.¹⁵ The Court’s conclusion is reasonable given the undue burden the arbitration agreement imposed on the *Asturcom* consumer.

However, the *Asturcom* reasoning goes much further by generally making Article 6 of Directive 93/13 part of public policy. In line with our earlier comments on *Mostaza Claro*,¹⁶ consumers may now challenge arbitral awards not only on the grounds that an arbitration clause is unfair, but also on the grounds that any other contract term applied by the arbitral tribunal is unfair pursuant to Directive 93/13. This opens the door for a comprehensive *revision au fond* of the arbitral award contrary to general principles of arbitration law.

courts at the seller’s place may be considered an unfair term under the Directive, and where the national court considers such clause unfair it must not apply the clause when it is ascertaining its own territorial jurisdiction.

¹⁴ *Asturcom*, Opinion of the Advocate General, para. 76.

¹⁵ See *Asturcom* at para. 54: “The national court or tribunal is also under such an obligation where, under the domestic legal system, it has a discretion whether to consider of its own motion whether such a clause is in conflict with national rules of public policy” (with references to Joined Cases C 430/93 and C 431/93 *van Schijndel and van Veen* [1995] ECR I 4705, paras 13, 14 and 22, and Case C 2/06 *Kempter* [2008] ECR I 411, para. 45).

¹⁶ Graf/Appleton, “*Elisa María Mostaza Claro v Centro Móvil Milenium SL*: EU Consumer Law as a Defence against Arbitral Awards - ECJ Case C-168/05”, ASA Bull. 1/2007, p. 48.

While *Asturcom* only concerned a national arbitration in Spain between two Spanish parties, it can be expected that, as in the case of competition law rules in *Eco-Swiss*,¹⁷ the ECJ would likewise consider the EU law related to unfair terms to rank as public policy in a defence against the enforcement of a foreign arbitral award under the New York Convention. This may already be inferred from the New York Convention's reference to the public policy of the country where enforcement is sought,¹⁸ as its public policy should include EU law governing unfair terms under the *Asturcom* "equal standing" reasoning.

Asturcom is likely to have implications for practice in EU Member States by requiring more stringent *sua sponte* scrutiny of arbitral awards against consumers.¹⁹ Arbitration as a means of dispute resolution in B2C relationships with an EU based consumer is losing its attractiveness. While much can be said in favour of national court restraint where the arbitral tribunal has considered and ruled on questions concerning unfair terms,²⁰ in practice this may turn out to be wishful thinking. Even if a national court does not invalidate an arbitration clause, the risk remains that a national court would undertake a complete review and possibly a "re-hearing" on questions regarding unfair terms – in other words national courts are increasingly likely to examine substantive contractual issues that were addressed or should have been addressed in arbitration. Thus, in situations where issues regarding unfair terms pursuant to EU law may arise, it could

¹⁷ Case C 126/97 *Eco Swiss* [1999] ECR I-3055. At para. 39, the ECJ expressly states that Article 81 of the EC Treaty "may be regarded as a matter of public policy within the meaning of the New York Convention."

¹⁸ Article V(2)(b) of the New York Convention.

¹⁹ For example, in a decision of 22 July 2009 (OGH case 3Ob144/09m) that predates *Asturcom* the Austrian Supreme Court addressed the applicability of Austrian consumer protection laws to foreign arbitral awards. The Court recognised that portions of Austrian consumer protection laws may constitute part of Austrian public policy that may be invoked to hinder enforcement under Article V(2)(a) - (c) of the New York Convention. This could, inter alia, include provisions of Austrian law that (i) restrict the freedom to select the place of arbitration, and (ii) require that arbitration clauses must be individually negotiated with consumers. However, as the consumer had failed to (i) raise these issues in the arbitration proceedings, and (ii) argue before the Austrian national court that the arbitration clause had not been individually negotiated, the Supreme Court found no basis to deny enforcement of the foreign arbitral award. In light of *Asturcom*'s requirement of a *sua sponte* assessment of unfair terms, it is submitted that in future enforcement actions the Austrian Supreme Court should examine more closely how the arbitration provision was negotiated and not simply defer to the consumer's failure to invoke that issue in the national court proceedings. It is also submitted that the Austrian Supreme Court should also give less weight to a consumer's failure to raise issues related to unfair terms during the arbitration proceeding. The German text of the case is available at <http://www.ris.bka.gv.at>

²⁰ See Graf/Appleton, *Elisa María Mostaza Claro v Centro Móvil Milenium SL: EU Consumer Law as a Defence against Arbitral Awards* - ECJ Case C-168/05, ASA Bull. 1/2007 pp. 57 et seq., 63.

be more efficient for businesses to avoid B2C²¹ arbitration clauses, and to instead resolve disputes before national courts in order to avoid duplicative proceedings and costs.

²¹ B2C means business-to-consumer. In some countries, arbitration agreements with consumers are also subject to rigid, impractical form requirements. Even business-to-business (B2B) situations may raise problems. As an example of refusal to enforce a B2B arbitral award due to unfair terms in a B2B arbitration clause, see the German regional appeals court case, OLG Bremen Case 2 Sch 2/08 of 30 October 2008, OLGR Bremen 2009, 156-157. A Dutch subsidiary of a US fast food group concluded a standard franchise agreement with a German franchisee. The agreement applied Liechtenstein law with the seat of the arbitration in New York under the UNCITRAL rules administered by the ICDR. The German court applied Liechtenstein law and held that under Liechtenstein law governing unfair standard terms the arbitration clause was invalid because it grossly and unfairly disadvantaged the franchisee (distant venue in New York without any reasonable connection to the contract relationship, only advantageous for franchisor's parent company). Since the arbitration clause was held invalid, the court denied enforcement of the US arbitral award under Article V(1)(a) of the New York Convention.

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