

**Council Directive 93/13 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.**

**JUDGMENT OF THE COURT (First Chamber)**

**26 October 2006**

(Directive 93/13/EEC – Unfair terms in consumer contracts – Failure to raise the unfair nature of a term during arbitration proceedings – Possibility of raising that objection in the context of an action brought against the arbitration award)

In Case C-168/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Madrid (Spain), made by decision of 15 February 2005, received at the Court on 14 April 2005, in the proceedings

Elisa María Mostaza Claro

v

Centro Móvil Milenium SL,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász, J.N. Cunha Rodrigues (Rapporteur) and M. Ilešič, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Centro Móvil Milenium SL, by H. García Pi, abogado,
- the Spanish Government, by E. Braquehais Conesa, acting as Agent,
- the German Government, by C. Schulze-Bahr, acting as Agent,
- the Hungarian Government, by P. Gottfried, acting as Agent,
- the Finnish Government, by T. Pynnä, acting as Agent,
- the Commission of the European Communities, by A. Aresu and L. Escobar Guerrero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

### **Judgment**

1 The reference for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) ('the Directive').

2 This reference has been made in the context of proceedings between Ms Mostaza Claro and Centro Móvil Milenium SL ('Móvil') concerning the validity of an arbitration clause included in the contract which she concluded with that company.

Legal context

Community legislation

3 Article 3(1) of the Directive provides:

'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.'

4 Article 6(1) of the Directive provides:

'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.'

5 Article 7(1) of the Directive provides:

'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.'

6 The annex to the Directive contains an indicative list of the terms which may be regarded as unfair. Among them, point 1(q) of that annex refers to terms which have the object or effect of '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.'

#### National legislation

7 Under Spanish law, consumers were initially protected against unfair terms by Ley General 26/1984 para la Defensa de los Consumidores y Usuarios, of 19 July 1984, *Boletín Oficial del Estado* (Official State Gazette) (BOE) No 176 of 24 July 1984 (General Law 26/1984 for the protection of consumers and users) ('Law 26/1984').

8 Law 26/1984 was amended by Ley 7/1998 sobre Condiciones Generales de la Contratación, of 13 April 1998, BOE No 89 of 14 April 1998 (Law 7/1998 on general contractual conditions) ('Law 7/1998'), which transposed the Directive into national law.

9 In particular, Law 7/1998 added to Law 26/1984 an Article 10a and a first additional provision.

10 Article 10a(1) of Law 26/1984 provides: '[A]ll those terms not individually negotiated which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, shall be regarded as unfair terms. In any event, the terms listed in the first additional provision to this Law shall be regarded as unfair. ...'

11 The first additional provision to Law 26/1984 essentially reproduces the list of terms capable of being regarded as unfair which is annexed to the Directive, stating that that list is merely minimal in nature. According to point 26 of that additional provision, 'submission to arbitration other than consumer arbitration, except in the case of arbitration bodies established by statutory provision in respect of a specific sector or circumstances' is to be regarded as unfair.

12 Article 8 of Law 7/1998 provides:

1. General conditions which infringe the provisions of this Law or any other rule ordering or prohibiting certain conduct, to the detriment of a party to the contract, shall automatically be void, save in so far as they make separate provision for cases of breach.

2. In particular, general terms which are unfair, where the contract has been concluded with a consumer as defined in any event in Article 10a and the first additional provision of Law 26/1984 ... shall be void.'

13 At the time of the facts in the main proceedings, arbitration proceedings were governed by Ley 36/1988 de Arbitraje, of 5 December 1988, BOE No 293 of 7 December 1988 (Law 36/1988 on arbitration) ('Law 36/1988').

14 Article 23(1) of Law 36/1988 provided:

'An objection to arbitration on the ground that the arbitrators lack objective jurisdiction or on the grounds of the non-existence, nullity or expiry of the arbitration agreement must be raised at the same time as the parties make their initial submissions.'

15 Article 45 of Law 36/1988 was worded as follows:

'The arbitration award may be annulled only in the following cases:

1. Where the arbitration agreement is null and void.

...

5. Where the award is contrary to public policy.'

The dispute in the main proceedings and the question referred to the Court

16 On 2 May 2002, a mobile telephone contract was concluded between Móvil and Ms Mostaza Claro. The contract contained an arbitration clause under which Any disputes arising from the contract were to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and in Equity) (AEADE).

17 As Ms Mostaza Claro did not comply with the minimum subscription period, Móvil initiated arbitration proceedings before the AEADE. By letter of 25 July 2003, the latter granted Ms Mostaza Claro a period of 10 days in which to refuse arbitration proceedings, stating that, in the event of refusal, she could bring legal proceedings. Ms Mostaza Claro presented arguments on the merits of the dispute, but did not repudiate the arbitration proceedings or claim that the arbitration agreement was void. The arbitration proceedings subsequently took place and the arbitrator found against her.

18 Ms Mostaza Claro contested the arbitration decision delivered by the AEADE before the referring court, submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void.

19 In the order for reference, the Audiencia Provincial (Provincial Court) de Madrid (Spain) states that there is no doubt that the arbitration agreement includes an unfair contractual term and is therefore null and void.

20 However, as Ms Mostaza Claro did not plead that the agreement was invalid in the context of the arbitration proceedings, and in order to interpret the national law in accordance with the Directive, the Audiencia Provincial de Madrid decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'May the protection of consumers under Council Directive 93/13/EEC ... require the court hearing an action for annulment of an arbitration award to determine whether the arbitration agreement is void and to annul the award if it finds that that 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?'

### **Preliminary observations**

21 It is apparent from the documents sent to the Court by the Audiencia Provincial that the latter has established that the arbitration clause contained in the contract concluded between Móvil and Ms Mostaza Claro was unfair.

22 In that respect, it must be recalled that the Court may not rule on the application of general criteria used by the Community legislature in order to define the concept of unfair term to a particular term, which must be considered in the light of the particular circumstances of the case in question (Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 22).

23 It is therefore for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive (*Freiburger Kommunalbauten*, paragraph 25).

### **The question referred**

24 According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, inter alia, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-0000, paragraph 57).

25 The system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards 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 (Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25).

26 Such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, paragraph 27).

27 It is on the basis of those principles that the Court has ruled that the national court's power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers (*Océano Grupo Editorial and Salvat Editores*, paragraph 28, and Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32).

28 That power of the national court has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them (*Océano Grupo Editorial and Salvat Editores*, paragraph 26, and *Cofidis*, paragraph 33).

29 The protection which the Directive confers on consumers thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve (*Cofidis*, paragraph 34).

30 Under those circumstances, the result sought by Article 6 of the Directive which, as was recalled at paragraph 27 of this judgment, requires the Member States to ensure that consumers are not bound by unfair terms, could not be achieved if the court seised of an action for annulment of an arbitration award was unable to determine whether

that award was void solely because the consumer did not plead the invalidity of the arbitration agreement in the course of the arbitration proceedings.

31 Such an omission by the consumer could not then, under any circumstances, be compensated for by action on the part of persons not party to the contract. The regime of special protection established by the Directive would be definitively undermined.

32 This is precisely the direction that has been taken by the Spanish legislation. Although not applicable to the dispute in the main proceedings, it is worth pointing out that Ley 60/2003 de Arbitraje, of 23 December 2003, BOE No 309 of 26 December 2003 (Law 60/2003 on Arbitration), no longer requires an objection to the arbitration, in particular on the grounds of the invalidity of the arbitration agreement, to be raised at the same time as the parties make their original claims.

33 Móvil and the German Government submit that, if the national court were allowed to determine whether an arbitration agreement is void where the consumer did not raise such an objection during the arbitration proceedings, this would seriously undermine the effectiveness of arbitration awards.

34 It follows from that argument that it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances (Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 35).

35 However, the Court has already ruled that, where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type (see, to that effect, *Eco Swiss*, paragraph 37).

36 The importance of consumer protection has in particular led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in a contract concluded with a consumer by a seller or supplier 'shall ... not be binding on the consumer'. This is a mandatory provision 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.

37 Moreover, as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) 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 (see, by analogy, concerning Article 81 EC, *Eco Swiss*, paragraph 36).

38 The nature and importance of the public interest underlying the protection which the 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.

39 Having regard to the foregoing, the answer to the question referred must be that the Directive must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

### **Costs**

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

### **On those grounds, the Court (First Chamber) hereby rules:**

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer

has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

[Signatures]

Language of the case: Spanish

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