OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 27 April 2006 [1]

1. By order of 15 February 2005, the Audiencia Provincial de Madrid (Provincial Court, Madrid, hereinafter 'Audiencia Provincial') referred a question to the Court under Article 234 EC for a preliminary ruling on the interpretation of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts (hereinafter 'Directive 93/13' or simply 'the Directive'). [2]

2. In particular, the Audiencia Provincial seeks to ascertain whether the system of consumer protection established by the Directive requires that a national court hearing an action for annulment of an arbitration award be able to determine of its own motion the illegality of an arbitration clause which has been found to be unfair, even if the plea to that effect was not raised in the course of the arbitration proceedings and is raised for the first time by the consumer in the application for annulment.

1 — Original language: Italian.

2 — OJ 1993 L 95, p. 29.

I — Legal framework

A — *Community law*

Directive 93/13

3. In order to 'facilitate the establishment of the internal market' and provide 'more effective protection of the consumer' within that market (sixth, eighth and tenth recitals in the preamble), the Council approved Directive 93/13 on 5 April 1993.

4. Under Article 3(1):

'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.'

5. Article 4(1) provides that:

'Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.'

6. Article 6(1) establishes that:

'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 ...'.

7. Article 7 in turn provides that:

'1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

8. Finally, it should be noted that the Directive has an annex which contains an indicative list of terms which may be regarded as unfair. The terms listed in the annex include, under (q), 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'.

B — *National law*

The Spanish provisions on unfair terms

9. Directive 93/13 was transposed into Spanish law by Law 7 of 13 April 1998 (hereinafter 'Law 7/1998'). [3]

10. Article 8(2) of that Law provides that:

'... [G]eneral 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 of 19 July 1984 [hereinafter "Law 26/1984"], [4] shall be void'.

11. The concept of unfair terms is defined in Articles 10 and 10a of Law 26/1984. In addition, point 26 of the first additional provision of that Law specifies that '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.

The Spanish provisions on arbitration

12. At the time at which the events in issue occurred, arbitration proceedings were governed by Law 36 of 5 December 1988 (hereinafter 'Law 36/1988'). [5]

13. For the purposes of the present case, particular reference should be made to Article 23 of that Law, which provides that:

'1. An objection to the arbitration on the ground that the arbitrators lack objective jurisdiction or on the grounds of the non-existence, nullity or expiry of the arbitration

3 — Ley 7/1998, Sobre Condiciones Generales de la Contratación (Law 7/1998 of 13 April 1998 on general contractual conditions) (*Boletín Oficial del Estado* (Official State Gazette) ('BOE') No 89 of 14 April 1998, p. 12304).

4 — Ley 26/1984, General para la Defensa de los Consumidores y Usuarios (Law 26/1984 of 19 July 1984 for the protection of consumers and users) (BOE No 176 of 24 July 1984, p. 21686).

5 — Ley 36/1988 de Arbitraje (Law 36/1988 of 5 December 1988 on arbitration) (BOE No 293 of 7 December 1988, p. 34605).

agreement must be raised at the same time as the parties make their initial submissions.

...'

14. Attention is also drawn to Article 45, which provides that:

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

1. Where the arbitration agreement is null and void.

2. Where the formalities and essential principles laid down by statute as to the appointment of arbitrators and the conduct of the arbitration proceedings have not been observed.

3. Where the award was made out of time.

4. Where the arbitrators have decided issues which had not been submitted to them for decision or where, although those issues were submitted, they cannot be the subject of arbitration ... .

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

II — Facts and procedure

15. The subject of the main proceedings is a dispute between Ms Mostaza Claro and Centro Móvil Milenium SL (hereinafter 'Centro Móvil').

16. On 2 May 2002, Ms Mostaza Claro concluded a mobile telephone contract (hereinafter 'the contract') with Centro Móvil which specified a minimum subscription period. The contract contained an arbitration clause under which any disputes arising from the contract were to be referred for settlement by an arbitrator designated by the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and in Equity, hereinafter 'AEADE').

17. On establishing that the minimum subscription period had not been completed, Centro Móvil initiated arbitration proceed-

ings before the AEADE, which granted Ms Mostaza Claro a period of 10 days in which to decide whether to refuse arbitration or to file submissions and present evidence to the arbitrator in support of her position. Ms Mostaza Claro put forward a number of arguments in her defence within the allotted time but did not claim that the arbitration clause was void.

18. The arbitrator concluded that Ms Mostaza Claro's arguments were unfounded and accordingly gave a decision on 22 September 2003 awarding Centro Móvil compensation for the damage which it had suffered and reimbursement of the costs incurred in the proceedings.

19. Ms Mostaza Claro challenged that decision before the Audiencia Provincial. Before that court, the applicant claimed for the first time that the arbitration clause was unfair and that the award should consequently be annulled. Centro Móvil opposed the application, arguing that, under Article 23 of Law 36/1988, the claim that the clause was void ought to have been raised in the arbitration proceedings and could not therefore be taken into consideration in the judicial proceedings for annulment of the award.

20. The Audiencia Provincial found that, under Law 26/1984 (Articles 10, 10a and the first additional provision) and Law 7/1998 (Article 8), the arbitration clause included in the contract was unfair. However, in the absence of a specific challenge by the consumer in the arbitration proceedings, it doubted whether it could of its own motion declare that the clause was void.

21. On those grounds, the Audiencia Provincial referred the following question to the Court:

'May the protection of consumers under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts 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?'

22. In the proceedings thus instituted, written observations have been submitted by Centro Móvil, the Spanish, German, Hungarian and Finnish Governments, and the Commission.

III — Legal analysis

Introduction: the question of the unfair nature of the arbitration clause at issue in the main proceedings

23. Before taking a position on the question referred to the Court, the parties which submitted written observations first spent a significant period of time considering a preliminary question, namely whether the arbitration clause at issue in the main proceedings really is an unfair term, that is to say, 'a contractual term which has not been individually negotiated' and which, 'contrary to the requirement of good faith, ... causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' (Article 3(1) of the Directive).

24. Centro Móvil takes the view that the existence of a term prohibited by Directive 93/13 can be excluded in the present case inasmuch as, having entered into the telephone subscription contract in the context of her own professional activity, Ms Mostaza Claro could not be regarded as a 'consumer'. It also claims that the clause in question was individually negotiated with the applicant and consequently did not come within the ambit of Article 3.

25. The Hungarian Government, by contrast, considers that it is not clear from the order for reference whether the clause in question satisfies the requirements laid down in Directive 93/13. It adds that, in any event, the Directive does not require Member States to regard as unfair all terms of consumer contracts which provide legally recognised alternative means of settling disputes.

26. The position of the Finnish Government and the Commission is different again. In their view, the clause at issue in the main proceedings undoubtedly satisfies the requirements laid down in the abovementioned Article 3. In particular, according to the Finnish Government, it causes a significant contractual imbalance to the detriment of the consumer, who as a rule does not have the necessary legal expertise to assess the implications arising from the inclusion of an arbitration clause in the contract. The Finnish Government and the Commission add that the clause is among those figuring on the indicative list in the annex to the Directive, notably under (q), which 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'.

27. For my part, I am inclined rather to share the view taken by the Commission and the Finnish Government on this issue. Apart from that, however, it seems to me that there is another question that ought to be asked at this point.

28. As we know, in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may indeed 'interpret general criteria used by the Community legislature in order to define the concept of unfair terms'. However, it may not 'rule on the application of these general criteria to a particular term', which, under Article 4 of the Directive, must be considered in the light of all the circumstances attending the conclusion of the contract in 'the case in question', circumstances of which the national court alone has direct knowledge. [6]

29. In the division of functions provided for by the Treaty, it is for the national court, which alone has direct knowledge of those circumstances, 'to decide whether [the] contractual term ... at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive'. [7]

30. Nor can any different conclusion be drawn from the case of *Océano Grupo Editorial*, [8] in which however — as the Commission has pointed out — the Court made that assessment. In its subsequent judgment in *Freiburger Kommunalbauten*, [9] the Court explained that the aforementioned case represents a precedent that is most exceptional and is therefore not generally applicable.

31. According to the Court, the main proceedings in *Océano Grupo Editorial* concerned a jurisdiction clause which conferred 'jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller [had] his principal place of business'. The term in question was thus 'solely to the benefit of the seller and contained no benefit in return for the consumer' and was therefore quite patently unfair. That was the only ground on which it was possible for the Court to hold that the term was unfair 'without having to consider all the circumstances in which the contract was concluded'. [10]

6 — Judgment in Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 22. See also judgments in Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 11, and Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 58.

7 — Judgment in *Freiburger Kommunalbauten*, cited in footnote 6, paragraph 25.

8 — Judgment in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

9 — Judgment in *Freiburger Kommunalbauten*, cited in footnote 6.

10 — Judgment in *Freiburger Kommunalbauten*, cited above, paragraph 23.

32. In most cases, however, it will not be clear that the term is unfair and it is therefore for the national court to determine whether the criteria laid down in Article 3(1) of the Directive apply in those cases.

33. In the present case, the referring court did in fact consider whether the arbitration clause in question was unfair. In its order for reference, the Audiencia Provincial held that 'there is no doubt that the arbitration agreement included in the promotional contract for a mobile telephone concluded between Ms Mostaza Claro and Centro Móvil Milenium is tainted with invalidity on account of its containing an unfair term' within the meaning of the national law transposing Directive 93/13.

34. In that situation, I therefore consider that the Court can do no more than take note of that assessment. Especially, I should add, as the referring court has not in fact asked about the nature of the term but only whether it can declare of its own motion that the term is unlawful.

35. It should be noted that, in accordance with settled case-law, under the Treaty attribution of areas of competence, it is for the national court to determine the questions which are relevant for the purpose of settling the dispute in the main proceedings and the questions on which the Court is in principle required to rule. [11]

36. Only exceptionally, and in so far as it is necessary in order to give an answer which will be 'useful to the national court', may the Court modify the questions and/or examine new questions. [12] However, no one has claimed, nor does it appear from the documents in the case, that circumstances of this kind obtain in the present case.

37. I therefore conclude that in the present case it is necessary to concur with the assessment of the national court, which found that the term at issue in the main proceedings is unfair. I therefore propose to examine the question posited in the light of that finding.

The question

38. As we have seen, by its single question, the national court seeks to ascertain whether

11 — Judgments in Case 83/78 *Redmond* [1978] ECR 2347, Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20, Case C-186/90 *Durighello* [1991] ECR I-5773 and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23.

12 — See judgment in Case C-1/02 *Privat-Molkerei Borgmann* [2004] ECR I-3219, paragraph 19. See also, however, among many others, the judgments in Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9, and Case C-42/96 *Immobiliare SIF* [1997] ECR I-7089, paragraph 28.

the system for the protection of consumers established by the Directive requires that a national court seised of an action for annulment of an arbitration award be able to determine of its own motion that an arbitration clause which has been found to be unfair is void and consequently to annul the award, even if the consumer did not enter a plea to that effect in the course of the arbitration proceedings and did so for the first time in the application for annulment.

39. In this connection, I agree with the Spanish, Hungarian and Finnish Governments and the Commission that, in the light of the case-law of the Court, that question can be answered in the affirmative.

40. Indeed, the Court has already recognised that national courts may determine of their own motion, in cases where the seller or supplier seeks enforcement of a contract, that unfair terms in contracts are unlawful.

41. In the judgment in *Océano Grupo Editorial*, [13] cited above, the Court pointed out that Article 7(2) of the Directive allows authorised consumer associations to take action in order to obtain a decision as to whether terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts. The reason for this, according to the Court, is that that provision is part of a system of protection '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' and that such a situation 'may only be corrected by positive action unconnected with the actual parties to the contract'. [14]

42. According to the Court, in a system that allows actions of this kind, 'it is hardly conceivable that ... a court hearing a dispute on a specific contract containing an unfair term should not be able to set aside application of the relevant term solely because the consumer has not raised the fact that it is unfair'. [15] Conversely, it is consistent with such a system to allow positive action by the national court in the form of a determination of its own motion that the term is unlawful and, if need be, non-application of the term in question.

43. The Court subsequently added, in the judgment in *Cofidis*, that courts must be accorded the power to determine the illegality of an unfair term even if the consumer

13 — Judgment in *Océano Grupo Editorial*, cited in footnote 8.

14 — Judgment in *Océano Grupo Editorial*, cited above, paragraphs 25 and 27.

15 — Judgment in *Océano Grupo Editorial*, cited above, paragraph 28.

fails to raise the unfair nature of the term within the time-limit fixed under national law. [16]

44. In this connection, the Court pointed out that the protection provided for consumers under Directive 93/13 was intended to be 'effective protection' and to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers (Article 7) and to prevent an individual consumer from being bound by an unfair term in a contract (Article 6). [17]

45. According to the Court, the effectiveness of that protection is liable to be adversely affected, in proceedings brought by sellers or suppliers, by 'the real risk that [the consumer] is unaware of his rights' or is deterred 'from enforcing them on account of the costs which judicial proceedings would involve'. To prevent that risk, the power in question must therefore also extend, at least in proceedings brought by sellers or suppliers, to 'cases in which a consumer ... fails to raise the unfair nature' of the term in the contract before the 'expiry of a limitation period' fixed by the national legislature. [18]

46. Centro Móvil and the German Government, however, contend that the above-mentioned considerations do not apply in the present case. In this case, the risk that the protection of the consumer might be adversely affected is precluded by the fact that Ms Mostaza Claro was at liberty, under the arbitration clause, to refuse arbitration and, under Article 23 of Law 36/1988, to argue that the clause in question was void in the initial statement of defence submitted to the arbitrator.

47. I note, however, that in the present case, just as in *Cofidis*, there was a real risk (which in fact materialised) that in the arbitration proceedings initiated by the seller, the consumer might fail to exercise that power out of ignorance or fear of the costs of an action before the ordinary judicial authorities, which she would have to meet once the arbitration agreement had been rejected or declared void.

48. Not only that, but the time she was given to choose between availing herself of that option or abandoning hope of reaching a speedier and less costly resolution of the dispute was so short as to render it excessively difficult, if not impossible, for her to exercise the choice in question. It is apparent from the order for reference that, under the arbitration clause drafted by

16 — Judgment in Case C-473/00 *Cofidis* [2002] ECR I-10875.
17 — Judgment in *Cofidis*, cited above, paragraphs 32 and 33.
18 — Judgment in *Cofidis*, cited above, paragraphs 33 to 36.

Centro Móvil, all disputes arising under the contract were to be submitted to an arbitration body (AEADE) which granted Ms Mostaza Claro a period of only 10 days in which to refuse arbitration or, if she did not refuse arbitration, to file submissions and present evidence in her defence.

49. Thus, contrary to what Centro Móvil and the German Government contend, the consumer's right to a fair hearing appears to be severely limited under that procedure.

50. Centro Móvil and the German Government, however, also raise a different material objection to extending the findings in *Océano Grupo Editorial* and *Cofidis* to the present case. In their view, to allow the court hearing the action for annulment to determine the illegality of the arbitration clause even if no plea to that effect was entered within the prescribed time-limit would be highly prejudicial to the requirement of efficiency and certainty in arbitration decisions. That was, however, a requirement that the Spanish legislation was designed to preserve, specifically by fixing procedural limits for claims relating to the arbitration clause and by restricting the cases in which the award could be annulled to those contained in an exhaustive list (Articles 23 and 45 of Law 36/1988).

51. It is undoubtedly in the interest of 'efficient arbitration proceedings' that 'review of arbitration awards' should be limited in scope. [19] As Centro Móvil and the German Government have rightly pointed out, that requirement is reflected in numerous procedural rules and various international instruments [20] which identify a specific number of cases in which 'annulment of or refusal to recognise an award' is possible. [21]

52. However, it does not seem to me that there is any risk of that requirement being subverted in the present case. The Spanish legislation, like most of the national legislation and international instruments on the subject, [22] includes among the cases in which an award may be annulled those where the award is contrary to public policy (Article 45(5) of Law 36/1988), irrespective of any challenge by the parties.

53. Moreover, the Court held in the celebrated judgment in *Eco Swiss* that 'where its domestic rules of procedure require a

19 — Judgment in Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 35.

20 — See Article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, and Article 34 of the Model Law on International Commercial Arbitration produced by the United Nations Commission on International Trade Law.

21 — Judgment in *Eco Swiss*, cited above, paragraph 35.

22 — See Article 5(2)(b) of the New York Convention and Article 34(2)(b) of the Model Law on International Commercial Arbitration, cited above.

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' similar Community rules. [23]

54. The Court held in that case that such rules include Article 81 EC, which in its view is to be regarded as a matter of public policy inasmuch as it constitutes a 'fundamental' provision which is 'essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market'. [24]

55. On the basis of that precedent, and in view of the importance attached to consumer protection in the Community legal order, the Commission considers that the provisions of Directive 93/13 can also be regarded as rules of public policy. In its view, the provisions in question are harmonising provisions approved for the purpose of providing more efficient protection for the consumer within the internal market. They are thus important provisions designed to contribute to 'the strengthening of consumer protection', a task mentioned in Article 3(1)(t) EC as one of the fundamental activities of the Community. The national courts are consequently required to ensure that those provisions are respected in actions for annulment of arbitration awards, even where — as in the present case — the failure to comply with the provisions has not been challenged in the arbitration proceedings.

56. I would not in principle here preclude the possibility that that may be a legitimate approach in this case. However, I fear that it is open to the objection that it might give excessively wide scope to a concept, namely that of public policy, which traditionally refers only to rules that are regarded as being of primary and absolute importance in a legal order.

57. In any event, it does not seem to me that the path proposed by the Commission is the only possible way of enabling a court to determine of its own motion the illegality of an award in proceedings for annulment. I consider, in fact, that in line with the general direction of Community case-law and the precedents cited above, the Court should be permitted to make that determination in the present case because it is a matter of ensuring observance of a fundamental principle of the legal order, namely the right to a fair hearing.

58. As we saw earlier (see point 48 et seq.), it is precisely and principally that right which is

23 — Judgment in *Eco Swiss*, cited above, paragraph 37.
24 — Judgment in *Eco Swiss*, cited above, paragraph 36.

seriously compromised by the term at issue in the present case.

59. According to the settled case-law of the Court, the right to be heard must be guaranteed 'in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person', [25] thus also in arbitration proceedings. Observance of that right is 'a fundamental principle of Community law' and it is 'one of the fundamental rights deriving from the constitutional traditions common to the Member States'. [26]

60. On that ground, it can therefore indeed be said that we have here a principle that forms part of the concept of Community public policy as adopted by the Court.

61. This is confirmed, moreover, by the judgment in *Krombach*, in which the Court was asked to interpret Article 27, point 1, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. [27] Under that provision, the courts of a Contracting State (the State in which enforcement is sought) may refuse to recognise a judgment delivered in another Contracting State (the State of origin) if such recognition is 'contrary to public policy'. The Court, having noted that observance of the right to be defended occupies a prominent position in the Community legal order, accordingly held that recourse to the 'public-policy' clause in the Convention must be permitted, since in that particular case the guarantees laid down in the legislation of the State of origin '[had] been insufficient to protect the defendant from a manifest breach of his right to defend himself'. [28]

62. In the light of the considerations set out above, I therefore take the view that the system for the protection of consumers established by Directive 93/13 requires that, in a case such as the present one, a national court seised of an action for annulment of an arbitration award be able to determine that an arbitration clause is unfair and to annul the award on the ground that it is contrary to public policy, even if that defect was not contested by the consumer in the course of the arbitration proceedings and is raised for the first time in the application for annulment.

25 — See judgments in Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39, and Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21.

26 — Judgment in Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 38.

27 — Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; three questions were referred in *Krombach* for a preliminary ruling on the interpretation of Article 27, point 1, of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36) as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended version — p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1).

28 — Judgment in *Krombach*, cited above, paragraph 44.

IV — Conclusion

63. In the light of the foregoing considerations, I propose that the Court give the following answer to the question referred by the Audiencia Provincial de Madrid:

The system for the protection of consumers established by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts requires that, in a case such as the present one, a national court seised of an action for annulment of an arbitration award be able to determine that an arbitration clause is unfair and to annul the award on the ground that it is contrary to public policy, even if that defect was not contested by the consumer in the course of the arbitration proceedings and is raised for the first time in the application for annulment.