JUDGMENT OF THE COURT (First Chamber)

6 October 2009 *

In Case C-40/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de Primera Instancia No 4 de Bilbao (Spain), made by decision of 29 January 2008, received at the Court on 5 February 2008, in the proceedings

Asturcom Telecomunicaciones SL

v

Cristina Rodríguez Nogueira,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano (Rapporteur), E. Levits and J.-J. Kasel, Judges,

* Language of the case: Spanish.

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Asturcom Telecomunicaciones SL, by P. Calderón Plaza and P. García Ibaceta, abogados,

— the Spanish Government, by J. López-Medel Bascones, acting as Agent,

— the Hungarian Government, by K. Veres, R. Somssich and M.Z. Fehér, acting as Agents,

— the Commission of the European Communities, by W. Wils and R. Vidal Puig, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2009,

gives the following

Judgment

1 This 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).

2 The reference was made in proceedings for enforcement of an arbitration award which had become final between Asturcom Telecomunicaciones SL ('Asturcom') and Mrs Rodríguez Nogueira concerning the payment of sums due under a subscription contract for a mobile telephone concluded by that company with Mrs Rodríguez Nogueira.

Legal context

Community legislation

3 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.'

4 Article 7(1) of Directive 93/13 is worded as follows:

'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.'

5 The Annex to that directive contains an indicative list of terms which may be regarded as unfair. These include, as referred to at paragraph 1(q) of the Annex, 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

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

7 Law 26/1984 was amended by Ley 7/1998 sobre Condiciones Generales de la Contratación (Law 7/1998 on general contractual conditions) of 13 April 1998 (BOE No 89 of 14 April 1998) ('Law 7/1998'), which transposed Directive 93/13 into national law.

8 In particular, Law 7/1998 added to Law 26/1984 an Article 10a, the first paragraph of which provides that '[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. …'.

9 Article 8 of Law 7/1998 provides as follows:

'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.'

10 At the time of the facts in the main proceedings, arbitration proceedings were governed by Ley 60/2003 de Arbitraje (Law 60/2003 on Arbitration) of 23 December 2003 (BOE No 309 of 26 December 2003) ('Law 60/2003').

11 Article 8(4) and (5) of Law 60/2003 was worded as follows:

'4. The court of first instance of the place in which the award was made shall have jurisdiction to hear an action for enforcement of the award in accordance with Article 545(2) of the Code of Civil Procedure …

5. An action for annulment of the arbitration award shall be brought before the Audiencia Provincial [Provincial Court] of the place in which the award was made.'

12 Article 22(1) and (2) of Law 60/2003 provided as follows:

'1. Arbitrators shall have jurisdiction to rule on matters falling within their own competence, including pleas relating to the existence or validity of arbitration agreements or any plea which, if upheld, would preclude an examination of the substance of the dispute. For that purpose, an arbitration agreement in a contract shall be regarded as a separate agreement, distinct from the other terms and conditions of the contract. Where it is decided by the arbitrators that the contract is void, the arbitration agreement shall not automatically be void.

2. The pleas referred to in paragraph 1 must be raised no later than in the statement of defence and the fact that a party has appointed or participated in the appointment of the arbitrators shall not preclude it from raising such pleas. A plea alleging that the arbitrators do not have competence to adjudicate on the question at issue must be raised as soon as the question which is alleged to be beyond their competence is raised in the arbitration proceedings.

The arbitrators shall admit pleas raised subsequently only if the delay in raising them is justified.'

13 Article 40 of Law 60/2003 was worded as follows:

'A final award can be challenged in an action for annulment in accordance with the provisions laid down in this title.'

14 Article 41(1) of Law 60/2003 stated as follows:

'An award may be annulled only where the party seeking annulment claims and proves that:

…

(f) the award is contrary to public policy.

…'

15 Under Article 41(4) of Law 60/2003, an action for annulment had to be brought within two months of the date of notification of the arbitration award.

16 Article 43 of Law 60/2003 provided as follows:

'A final award shall have the effect of res judicata and any appeal against that award shall lie only on a point of law, in accordance with the provisions of the Code of Civil Procedure applicable to final decisions.'

17 Article 44 of Law 60/2003 provided as follows:

'Enforcement of awards shall be governed by the provision laid down in the Code of Civil Procedure and in this title.'

18 Article 517(2)(2) of Ley 1/2000 de Enjuiciamiento Civil (Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000) ('Law 1/2000') provides that arbitration awards or decisions are enforceable.

19 Article 559(1) of Law 1/2000 is worded as follows:

'The party against whom enforcement is sought shall also have the right to resist enforcement on the ground of the following procedural irregularities:

1. The party against whom enforcement is sought does not have the legal character or representation referred to in the application;

2. the party seeking enforcement lacks the capacity or representation or it is not established that he has the capacity or representation referred to in the application;

3. the enforcement order is null and void because it does not set out the arbitration award or decision requiring performance of the contract, the document submitted does not satisfy the statutory requirements necessary for it to be enforceable or because the provisions in Article 520 of this law are infringed when execution is being carried out;

4. where the measure to be enforced is an arbitration award which has not been duly processed by a notary, the fact that it has not been authenticated.'

The dispute in the main proceedings and the question referred for a preliminary ruling

20 On 24 May 2004, a subscription contract for a mobile telephone was concluded between Asturcom and Mrs Rodríguez Nogueira. The contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity) ('AEADE'). The seat of that arbitration tribunal, which was not indicated in the contact, is located in Bilbao.

21 Since Mrs Rodríguez Nogueira failed to pay a number of bills and terminated the contract before the agreed minimum subscription period had expired, Asturcom initiated arbitration proceedings against her before the AEADE.

22 The arbitration award, made on 14 April 2005, ordered Mrs Rodríguez Nogueira to pay the sum of EUR 669.60.

23 Since Mrs Rodríguez Nogueira did not initiate proceedings for annulment of the arbitration award, it became final.

24 On 29 October 2007, Asturcom brought an action before the Juzgado de Primera Instancia (Court of First Instance) No 4 de Bilbao (Spain) for enforcement of the arbitration award.

25 In its order for reference, that court states that the arbitration clause in the subscription contract is unfair, particularly in view of the fact that, first, the costs incurred by the consumer in travelling to the seat of the arbitration tribunal were greater than the amount at issue in the dispute in the main proceedings. Next, according to that court, that seat is located at a considerable distance from the consumer's place of residence

and its location is not indicated in the contract. Lastly, that body itself draws up the contracts which are subsequently used by telecommunications undertakings.

26 However, the referring court also points out, first, that arbitrators are not permitted under Law 60/2003 to examine of their own motion whether unfair arbitration clauses are void and, second, Law 1/2000 does not contain any provision dealing with the assessment to be carried by the court or tribunal having jurisdiction as to whether arbitration clauses are unfair when adjudicating on an action for enforcement of an arbitration award that has become final.

27 In those circumstances, since it entertained doubts as to whether the national legislation, in particular its domestic procedural rules, is compatible with Community law, the Juzgado de Primera Instancia No 4 de Bilbao decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

'In order that the protection given to consumers by [Directive 93/13] should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, 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?'

The question referred for a preliminary ruling

28 By its question, the Juzgado de Primera Instancia No 4 de Bilbao asks, in essence, whether the Directive 93/13 must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has acquired the force of res judicata and was made in the absence of the consumer is required to

determine of its own motion whether an arbitration clause in a contract concluded between a consumer and a seller or supplier is unfair and to annul the award.

29 For the purpose of replying to the question referred, it is appropriate to note, first, that the system of protection introduced by Directive 93/13 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, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25).

30 As regards that weaker position, Article 6(1) of that directive provides that unfair terms are not binding on the consumer. As is apparent from case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Mostaza Claro*, paragraph 36, and Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25).

31 In order to guarantee the protection intended by Directive 93/13, the Court has also stated on a number of occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, paragraph 27, and *Mostaza Claro*, paragraph 26).

32 It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair (*Mostaza Claro*, paragraph 38).

33 However, the present case can be distinguished from that which gave rise to the judgment in *Mostaza Claro* in that Mrs Rodríguez Nogueira did not in any way become involved in the various proceedings relating to the dispute between her and Asturcom and, in particular, did not bring an action for annulment of the arbitration award made by the AEADE in order to challenge the arbitration clause on the ground that it was unfair, so that that award now has the force of res judicata.

34 Accordingly, it is necessary to determine whether the need to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them requires the court or tribunal responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert his rights and notwithstanding the fact that the domestic rules of procedure apply the principle of res judicata.

35 It is necessary at the outset to draw attention to the importance, both for the Community legal order and for the national legal systems, of the principle of res judicata.

36 Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 22).

37 Consequently, according to the case-law of the Court, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a

provision of Community law, regardless of its nature, on the part of the decision at issue (see, inter alia, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 47 and 48; *Kapferer*, paragraph 21; and *Fallimento Olimpiclub*, paragraph 23).

38 In the absence of Community legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness) (see, inter alia, *Kapferer*, paragraph 22, and *Fallimento Olimpiclub*, paragraph 24).

39 As regards, first, the principle of effectiveness, the Court has already held that every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14, and *Fallimento Olimpiclub*, paragraph 27).

40 In the present case, the arbitration award at issue in the main proceedings became final because the consumer in question did not bring an action for annulment of the award within the time-limit prescribed for that purpose.

41 According to established case-law, it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty (see, to this effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28; and Case

C-2/06 *Kempter* [2008] ECR I-411, paragraph 58). Such time-limits are not liable to make it virtually impossible or excessively difficult to exercise rights conferred by Community law (see, to that effect, Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34).

42 It is therefore necessary to ascertain whether it is reasonable to impose a two-month time-limit, such as that laid down in Article 41(4) of Law 60/2003, upon the expiry of which, in the absence of any action for annulment, an arbitration award becomes final and thus acquires the authority of res judicata.

43 In the present case, it should be noted first that, as the Court has already held, a period of 60 days is not objectionable per se (see, to that effect, *Peterbroeck*, paragraph 16).

44 A peremptory time-limit of that kind is reasonable in that it enables both an assessment to be made as to whether there are grounds for challenging an arbitration award and, if appropriate, the action for annulment of the award to be prepared. It should be pointed out that in the present case it has not been alleged that the national procedural rules governing the bringing of an action for annulment of an arbitration award, in particular the ruling imposing a two-month time-limit for that purpose, were unreasonable.

45 Moreover, it should be pointed out that Article 41(4) of Law 60/2003 provides that the time-limit starts to run from the date of notification of the arbitration award. Therefore, in the action in the main proceedings, it was not possible for the consumer to have found herself in a situation in which the limitation period had started to run, or had expired, without even being aware of the effects of the unfair arbitration clause upon her.

46 In such circumstances, such a time-limit is consistent with the principle of effectiveness, since it is not in itself likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derives from Directive 93/13 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55).

47 In any event, the need to comply with the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a national court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro*, but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final.

48 In the light of the foregoing considerations, it must be held that the procedural rules laid down by the Spanish system for the protection of consumers against unfair terms in contracts does not make it impossible or excessively difficult to exercise the rights conferred on consumers by Directive 93/13.

49 Next, in accordance with the principle of equivalence, the conditions imposed by domestic law under which the courts and tribunals may apply a rule of Community law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking (see, to that effect, inter alia, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraphs 13 and 17 and the case-law cited).

50 In order to determine whether that principle is complied with in the case before the national court, it is for that court, which alone has direct knowledge of the detailed procedural rules governing actions in the field of domestic law, to consider both the purpose and the essential characteristics of domestic actions which are claimed to be similar (see, inter alia, Case C-78/98 *Preston and Others* [2000] ECR I-3201,

paragraphs 49 and 56). However, with a view to the appraisal to be carried out by the national court, the Court may provide guidance for the interpretation of Community law (see *Preston and Others*, paragraph 50).

51 As pointed out at paragraph 30 above, Article 6(1) of Directive 93/13 is a mandatory provision. It should also be noted that, according to the Court's case-law, that directive as a whole constitutes, in accordance with Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community (*Mostaza Claro*, paragraph 37).

52 Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of 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.

53 It follows from this that, inasmuch as the national court or tribunal seised of an action for enforcement 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 in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task (see, to that effect, *Pannon GSM*, paragraph 32).

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 (see, to that effect, *van Schijndel and van Veen*, paragraphs 13, 14 and 22, and *Kempter*, paragraph 45).

55 As regards the case in the main proceedings, according to the Spanish Government, the court or tribunal responsible for enforcement of an arbitration award which has become final has jurisdiction to assess of its own motion whether an arbitration clause in a contract concluded between a consumer and a seller or supplier is null and void on the ground that such a clause is contrary to national rules of public policy. Moreover, a number of recent judgments of the Audiencia Provincial de Madrid (Provincial Court, Madrid) (Spain) and the Audiencia Nacional (National High Court) (Spain) have acknowledged that jurisdiction.

56 It is therefore for the Juzgado de Primera Instancia No 4 de Bilbao to ascertain whether that is the case in the dispute before it.

57 Lastly, as regards the consequences of a finding by the court responsible for enforcement that the arbitration clause in a contract concluded by a seller or supplier with a consumer is unfair, it should be recalled that Article 6(1) of Directive 93/13 requires the Member States to lay down that unfair terms are not to be binding on the consumer, 'as provided for under their national law'.

58 Accordingly, as the Hungarian Government suggested in its written observations, it is for the referring court to give due effect, in accordance with national law, to any finding in relation to the arbitration award that an arbitration clause is unfair, so long as the clause is not capable of binding the consumer.

59 In the light of the foregoing considerations, the answer to the question referred is that Directive 93/13 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.

Costs

60 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 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.

[Signatures]