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## Party Autonomy and Consumer Arbitration in Conflict: A “Trojan Horse” in the Access to Justice in the E.U. ADR-Directive 2013/11?

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**PARTY AUTONOMY AND CONSUMER  
ARBITRATION IN CONFLICT: A “TROJAN  
HORSE” IN THE ACCESS TO JUSTICE IN  
THE E.U. ADR-DIRECTIVE 2013/11?**

*Norbert Reich*<sup>†\*</sup>

ABSTRACT

*Arbitration clauses in consumer contracts have been subject to controversy in many jurisdictions; recent U.S. and Canadian Supreme Court case law have been used as examples. European Union (E.U.) law, which originally excluded arbitration in general from the Brussels/Rome regimes, has recently taken a mixed, and to some extent limited, approach by including Alternative Dispute Resolution (ADR) entities “imposing” a solution in its recent ADR Directive 2013/11. There seems to be an indirect encouragement to develop consumer arbitration schemes in E.U. Member States as a second route to justice. It is too early to evaluate this new and somewhat clandestine policy of the E.U. The paper insists on some additional procedural guarantees should consumer arbitration schemes become more popular among Member countries, even though Dir. 2013/11 already contains some “minimum protection” provisions on “specific acceptance” and applicable law. The basic reference for such additional protection is in Article 47 of the E.U. Charter of Fundamental Rights, viewed together with Article 19(1) para. 2 of the Treaty on the European Union (TEU) whereby “Member States shall “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. At the time of writing, the implementation measures of Member States concerning Dir. 2013/11 have to be awaited before making any final judgment as to their conformity with E.U. law and efficiency. The paper seeks to provide some guidelines for this coming debate.*

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<sup>†</sup> Before this article could be published, Prof. Dr. Norbert Reich passed away. This publication has been dedicated to his memory by his colleagues and this Journal.

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## INTRODUCTION

This paper discusses an important new development in conflict regulation between consumers and businesses in the E.U.—a subject matter which has kept me busy for some time. This paper will address the question of how a regime of extra-legal conflict management by ADR mechanisms, which are based on voluntary cooperation between consumers and traders, supplements, but does not replace, judicial court proceedings. This paper argues that a more intrusive regime to solve consumer complaints by binding arbitration will become increasingly popular. Justice will be more or less privatized under an efficiency rhetoric, which criticizes lengthy, costly, and highly discretionary court proceedings that exist in many Member States to the detriment of consumers and the working of justice in general. For many legal scholars, binding arbitration based on contractual agreements is regarded as an alternative; however, it is not always clear what the legal and consumer policy costs of an extension of ADR mechanisms are, and whether there is a fair balance between the supposed efficiency gains on the one hand and the requirements of effective legal protection on the other.

The paper will proceed as follows. First, it will give an overview of liberal and mixed regimes concerning the promotion of binding consumer arbitration, namely in the United States (Section I) and Canada (Section II) where the legitimacy and limits of consumer arbitration have been subject to controversial Supreme Court judgments. These judgments show the complexity of this issue and provide insight into future E.U. developments of ADR mechanisms in E.U. countries. Section III will analyze new trends in E.U. law provoked by the recently adopted ADR Directive 2013/11/EU,<sup>1</sup>

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<sup>1</sup> Directive 2013/11, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes 2013, 2014 O.J. (L 165/63) [hereinafter Directive 2013/11]. See Horst Eidenmüller & Martin Engel, *Die Schlichtungsfälle: Verbraucherrechtsdurchsetzung nach der ADR-Richtlinie und ODR-Verordnung der EU*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1704 (2013) for a critical appreciation of those who are not concerned with consumer arbitration specifically, but who fear not without justification a *de facto* denial of justice to consumers even if they take proceedings with a non-binding outcome; it is unrealistic to expect consumers to pursue their claim if rejected by the ADR-entity before courts

where consumer arbitration has found a place of its own in regulating ADR-entities “imposing solutions” on consumers. Section IV concerns the scope of application of Dir. 2013/11. Section V examines prior E.U. law in the form of two important, and in the opinion of this author, still valid precedents set by the Court of Justice of the E.U. (CJEU, then called ECJ), namely *Claro*<sup>2</sup> and *Asturcom*.<sup>3</sup> Sections VI through X propose some standards on valid consumer arbitration by reference to Dir. 2013/11 and other E.U. law instruments. These standards are then measured under a fundamental rights perspective contained in Article 47 of the E.U. Charter and Article 19(1)(a) Treaty of the European Union (TEU), namely the principle of effective judicial protection of rights granted to consumers under E.U. law.<sup>4</sup> Then, Section XI argues that these standards limit party-autonomy with regard to binding arbitration clauses in consumer contracts and require the adoption of additional mechanisms to curb an eventual abuse of arbitration clauses by traders or trade associations. Finally, Sections XII through XVII examine E.U. countries that must adapt their arbitration legislation to new E.U. standards. Some preliminary conclusions will follow.

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of law. The authors also question the legal basis of Article 114 of the Directive, although such discussion is beyond the scope of this paper.

<sup>2</sup> Case C-168/05, *E.M.M. Claro v. Centro Movil Milenium*, 2006 E.C.R. I-10421; see also Reich, *More clarity after “Claro”?*, *supra* note 1, at 41.

<sup>3</sup> Case C-40/08, *Asturcom Telecomunicaciones v. Rodríguez Noguera*, 2009 E.C.R. I-9579 ¶ 54-55. See Jules Stuyck, *Note to Pannon and Asturcom*, 47 COMMON MKT. L. REV. 879 (2010); Christopher Hodges, *Consumer Protection and Procedural Justice*, in LANDMARK CASES OF EU CONSUMER LAW: IN HONOUR OF JULES STUYCK 615 (Evelyn Terry et al. ed. 2013); Chantal Mak, *Judgment of the Court (First Chamber) of 6 October 2009, Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, Case C-40/08, Commentary*, 6 EUR. REV. CONTRACT L. 437 (2010); Martin Ebers, *ECJ (First Chamber) 6 October 2009, Case C-40/08, Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira – From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata* 18 EUR. REV. PRIVATE. L. 823 (2010). See also ALEXANDER J. BĚLOHLÁVEK, B2C ARBITRATION: CONSUMER PROTECTION IN ARBITRATION 7, 117, 133 (2012).

<sup>4</sup> See NORBERT REICH, GENERAL PRINCIPLES OF EU CIVIL LAW ch. IV (2014).

## I. A LIBERAL APPROACH: ADR IN THE UNITED STATES

In the words of the Supreme Court in *Southland Corp. v. Keating*, the Federal Arbitration Act (FAA)<sup>5</sup> “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>6</sup> U.S. law generally takes a very liberal view toward arbitration clauses without making a distinction between commercial and consumer arbitration.<sup>7</sup> This view was confirmed in the Court’s controversial decision of *Green Tree Fin. Corp. v. Randolph*.<sup>8</sup>

In *Green Tree Fin. Corp. v. Randolph*, Larketta Randolph signed a financing agreement for the purchase of a mobile home with Green Tree Financial. The agreement bound any disputes arising from the agreement to arbitration. When Randolph sued Green Tree for violating the Truth in Lending Act (TILA), the district court compelled arbitration. However, on appeal the Eleventh Circuit overturned the district court’s decision, finding that the arbitration agreement was unenforceable because the steep arbitration costs would negatively affect Randolph’s ability to vindicate her statutory rights. The Supreme Court disagreed and held that consumers bear the burden to prove that the arbitral forum is financially inaccessible to them.<sup>9</sup> This opinion was challenged by a strong dissent by Justices Ginsburg, Stevens, Souter, and Breyer (in part), who argued that, “as a repeat player in the arbitration required by its form contract, Green Tree has superior information about the costs to consumers of pursuing arbitration.”<sup>10</sup> This approach by the Supreme Court means that ADR mechanisms in favor of consumers can easily be avoided by arbitration clauses entered into by standard form contracts with consumers as in *Green Tree*.

Recent state court cases, however, show a somewhat more nuanced approach toward arbitration clauses. For example, *Comb v.*

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<sup>5</sup> The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2014) [hereinafter FAA].

<sup>6</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>7</sup> LARS WEIHE, DER SCHUTZ DER VERBRAUCHER IM RECHT DER SCHIEDSGERICHTSBARKEIT 116, 205-06 (2005) (for a critique from a consumer policy point of view with regard to “informed consent”).

<sup>8</sup> *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

<sup>9</sup> *Id.* at 92.

<sup>10</sup> *Id.* at 96.

*Paypal*<sup>11</sup> concerned a class action against an electronic disbursement service alleging illegal removal of funds.<sup>12</sup> The defendant, Paypal, argued that the case should have been submitted to arbitration because the contract contained an arbitration clause.<sup>13</sup> The District Court held that, despite its wide use and recognition in relevant California law, the arbitration clause was substantively unconscionable for several reasons.<sup>14</sup> First, there was a lack of mutuality whereby arbitration was imposed on the weaker party while the stronger party was allowed the choice of forum.<sup>15</sup> Second, the clause contained a prohibition against consolidation of claims.<sup>16</sup> Third, the costs of arbitration and venue were unconscionable because the “place or manner” in which arbitration was to occur unreasonably took into account “the respective circumstances of the parties.”<sup>17</sup>

*Cruz v. PacifiCare Health Systems*<sup>18</sup> concerned an action for false advertising and deceptive business practices of the defendant PacifiCare for inducing persons to subscribe to health plans.<sup>19</sup> PacifiCare claimed that the plaintiff, who obtained health coverage through his employer, was required to arbitrate his claim because of the subscriber agreement between PacifiCare and the plaintiff's employer.<sup>20</sup> The California Supreme Court held that the arbitration clause was unenforceable.<sup>21</sup> The Court's reasoning was similar to the decision in *Comb*, at least insofar as injunctive relief is concerned, but not with regard to restitution and unjust enrichment. Therefore, in California, claims for unjust enrichment are arbitrable, while claims for injunctions against deceptive advertising practices are not arbitrable because they are undertaken “in the public benefit.”

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<sup>11</sup> *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

<sup>12</sup> *Id.* at 1166.

<sup>13</sup> *Id.* at 1169-70.

<sup>14</sup> *Id.* at 1172.

<sup>15</sup> *Id.* at 1173-75.

<sup>16</sup> *Id.* at 1175-76.

<sup>17</sup> *Id.* at 1177 (quoting *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888, 894-95 (Ct. App. 2001)).

<sup>18</sup> *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003).

<sup>19</sup> *Id.* at 1159.

<sup>20</sup> *Id.* at 1160.

<sup>21</sup> *See generally id.*

The Supreme Court in *Buckeye Check Cashing Corp. v. Cardegna* seemed unconcerned by attempts to limit the effects of arbitration clauses in consumer contracts.<sup>22</sup> The litigation in *Cardegna* concerned a class action suit brought against usurious terms in a consumer credit agreement containing a broad arbitration clause.<sup>23</sup> The case was an appeal from a decision by the Florida Supreme Court, which set aside the arbitration clause.<sup>24</sup> The Florida Supreme Court reasoned that to enforce an agreement to arbitrate in a contract challenged as unlawful “could breathe life into a contract that not only violates state law, but is criminal in nature . . .”<sup>25</sup> The U.S. Supreme Court, per Justice Scalia, reversed the Florida Supreme Court and distinguished two causes in which arbitration clauses can be challenged in court:

- 1) The arbitration clause is unlawful as such; and
- 2) The entire contract from which the arbitration clause cannot be severed is invalid, which was not the case in a usurious credit agreement.

The Supreme Court held that, “regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”<sup>26</sup>

Consumer protection depends on the willingness of arbitrators to apply and enforce consumer protection provisions in particular of state law. Arbitration awards, however, are not published, and therefore are not subject to critical public and academic debate. It seems that there is no remedy under U.S. law against an arbitration award disregarding mandatory consumer protection provisions, unless the consumer can prove the existence of the narrow defenses

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<sup>22</sup> See generally *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

<sup>23</sup> *Id.* at 442-43.

<sup>24</sup> *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862 (Fla. 2005).

<sup>25</sup> *Id.* (quoting *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000)).

<sup>26</sup> *Buckeye Check Cashing, Inc.*, 546 U.S. at 449.



enumerated in the 1958 New York Convention.<sup>27</sup> Arbitration clauses have become a prominent and popular instrument to avoid the application of consumer protection provisions, at least in contract litigation between business and consumers, and particularly in class action suits.

An arbitration clause may be considered “substantially unconscionable,” as in the Pennsylvania case of *Bragg v. Linden Research*,<sup>28</sup> if an arbitration clause is either one-sided or non-transparent, or if there are additional costs to the consumer to arbitrate.

In *AT&T v. Concepcion*, the Supreme Court addressed the relationship between arbitration clauses in cellular telephone contracts between respondents (the Concepcions) and petitioner (AT&T) and the prohibition of classwide arbitration.<sup>29</sup> After the Concepcions were charged sales taxes on the retail value of phones provided free under their service contract, they sued AT&T in the United States District Court for the Southern District of California. Their suit was consolidated with a class action alleging, inter alia, that AT&T had engaged in false advertising and fraud by charging sales tax on “free phones”. The Supreme Court in rejecting the consolidation claim took the opposite view of the California Supreme Court,<sup>30</sup> which had ruled that consumers must have the right to proceed with a class action and shall not be forced into arbitration. Justice Scalia, writing for the majority, framed AT&T as a clash of two policies, namely, the policy

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<sup>27</sup> Defenses under the convention include: lack of proper notice, arbitration decision contrary to public policy of the forum country, manifest disregard of the law. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention], [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>28</sup> *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007). See GREG LASTOWKA, *VIRTUAL JUSTICE: THE NEW LAWS OF THE ONLINE WORLDS* 95 (2010) for a discussion of U.S. practice on enforcing contractual provisions containing an arbitration clause where the *Bragg* decision was found to be “rather surprising (to many legal commentators) and presume that other courts looking at the contracts of other virtual words will be more likely to find them enforceable.”

<sup>29</sup> See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>30</sup> *Discover Bank v Superior Ct.*, 113 P.3d 1100 (Cal. 2005).

of California courts favoring consumers' decision to opt for class actions, and the policy of the FAA favoring arbitration. The Supreme Court held that the FAA preempts the state court class action rule, so the dispute must be submitted to arbitration and shall not proceed as a class action.<sup>31</sup> In his dissent, Justice Breyer insisted that, due to the small amount of the individual claim (\$30.22), a denial of class actions practically means a denial of justice. This argument was rejected by the majority, who reasoned that class actions in arbitration proceedings are not useful and manageable remedies. As Justice Scalia said: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

*American Express Co. v. Italian Colors*, decided by the Supreme Court on June 20, 2013, concerned an arbitration clause that disallowed anti-trust claims to be brought by a class.<sup>32</sup> Again, the Court's majority reiterated its liberal view favoring arbitration as a "matter of contract," even against mandatory provisions of federal anti-trust laws. Justice Kagan's dissent, in my opinion, correctly insists on the "effective vindication" rule established in prior case law, which limits arbitration clauses where they effectively prevent enforcement of "congressionally created rights."<sup>33</sup> This is accomplished by arbitration clauses that de facto prevent compensation of anti-trust claims and undermine the deterrent effect of compensation for anti-trust infringements.

The case law of the Supreme Court limits effective consumer protection as provided by federal (anti-trust) and state law (the California Discover Bank rule<sup>34</sup>). The Court also seems to contradict the plain meaning of section 2 of the FAA, which reads:

[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable and

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<sup>31</sup> *Id.* at 1750-51.

<sup>32</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

<sup>33</sup> *Id.* at 2313.

<sup>34</sup> *Discover Bank*, 113 P.3d 1100.

enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.<sup>35</sup>

Therefore, the FAA would seem to allow limits to arbitration in consumer (and commercial) matters based on defenses such as fraud, duress, unconscionability, and mandatory (federal and/or state) law, which was in part developed by state courts but had been regarded with hostility by the Supreme Court majority. This practice creates, as the dissent in *American Express* pointed out, areas of de facto immunity from law: “[the FAA] reflects a federal policy favoring actual arbitration—that is, arbitration as a streamlined ‘method of revolving disputes,’ not as a foolproof way of killing off valid claims.”<sup>36</sup> However, the Supreme Court’s message in *American Express* is unequivocal: courts are required to enforce arbitration agreements, including class action waivers, in accordance with their terms.

Legal practitioners and scholars have criticized the Supreme Court’s liberal view on arbitration as an “excessive use” of arbitration clauses in consumer contracts.<sup>37</sup> The disadvantages of excessive use of arbitration for consumers seem to outweigh the advantages of arbitration for service and goods providers, namely:

- no possibility of a rational decision for or against arbitration before the dispute arises;

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<sup>35</sup> FAA, 9 U.S.C. § 2 (2014).

<sup>36</sup> *Am. Express Co.*, 133 S. Ct. at 2315.

<sup>37</sup> See WEIHE, *supra* note 8, at 43-45; Richard M. Alderman, *The Future of Consumer Law in the United States – Hello Arbitration, Bye-Bye Courts, So-Long Consumer Protection* (Univ. Hous. L. Ctr., Working Paper No. 2008-A-09, 2007); Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1 (2003); Gerhard Wagner, *Dispute Resolution as a Product: Competition between Civil Justice Systems*, in REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 347, 394 (Horst Eidenmüller ed. 2013). With regard to then existing smalls claims procedures, see NORBERT REICH, STAATLICHE REGULIERUNG ZWISCHEN MARKTVERSAGEN UND POLITIKVERSAGEN 129 (1988). See also GRAF-PETER CALLIESS, GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE 308-14 (2006) (providing a critical view (without citing the harsh case law of the U.S. Supreme Court)).

- the trader can always amend the arbitration clause unilaterally;
- no legal representation, no class actions, limited possibilities for bringing evidence, no legal dispute insurance;
- arbitrators cannot be formally obliged to apply state consumer protection legislation;<sup>38</sup>
- only limited access to documents (which are usually in the hand of the trader), no pre-trial discovery procedure;
- no jury, only limited appeal possibilities;
- frequently excessive costs, compared with existing small claims procedures; and
- the place of arbitration may be geographically distant from residence of consumer.

## II. A MIXED APPROACH: ADR IN CANADA

In terms of Canadian law on arbitration, a lively discussion existed among scholars in Canada on whether pre-contractual arbitration clauses could be enforced in consumer contracts, and whether they could eventually be used to avoid class actions similar to the United States.<sup>39</sup>

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<sup>38</sup> The American Arbitration Association (AAA) Consumer Due Process Protocol contains such an obligation, while the rules of the ICC (International Chamber of Commerce) are silent on that point. CALLIESS, *supra* note 39, at 359.

<sup>39</sup> See Shelley McGill, *The Conflict between Consumer Class Actions and Contractual Arbitration Clauses*, 43 CAN. BUS. L.J. 359 (2006); Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 MCGILL L.J. 693 (2006). *But see* David T. Neave & Jennifer M. Spencer, *Class Proceedings: The New Way to Trump Mandatory Arbitration Clauses?*, 63 THE ADVOCATE 495 (2005) (favoring of the use of arbitration clauses in consumer contracts, according to the U.S. model which is said to strike the “right balance”).

In *Dell Computer Corp. v. Union des Consommateurs*, the Canadian Supreme Court held that arbitration clauses in an electronic consumer contract for the purchase of computers from a U.S. company by a citizen of Quebec were also enforceable<sup>40</sup> against a class action brought by the Quebec “Union des consommateurs”. The Court reasoned that the consumer had access to the arbitration clause via a hyperlink on the website of the company, and that he agreed to be bound by the clause when he clicked on the link.<sup>41</sup> The Court also reasoned that “the clause was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page.”<sup>42</sup> Further, the Court stated that any challenge to the arbitration agreement must be resolved first by the arbitrator who has *Kompetenz-Kompetenz* under international agreements and Canadian law.<sup>43</sup> This doctrine is a traditional doctrine in (commercial) arbitration under which the arbitrator, and not a court of law, has the “competence-competence,” or the final say over the legality of arbitration proceedings, including the choice of the arbitrator.<sup>44</sup>

The dissenting judges disagreed with the majority, arguing that the arbitration and jurisdiction clauses, which are, according to the Quebec law, forbidden, are similar if they refer the consumer case to a non-Quebec authority. This is the case with the reference to the U.S. arbitrator as foreseen in the contract clause; the arbitration clause is therefore unenforceable.

A more recent case decided by the Canadian Supreme Court, *Seidel v. TELUS*, seems to take a more critical view on arbitration clauses in consumer contracts aimed at excluding class action proceedings against the supplier of cellular telephone services.<sup>45</sup> In

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<sup>40</sup> *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801 (Can.).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Case C-190/89, *Marc Rich & Co. AG v. Societa Italiana Impianti PA*, 1991 E.C.R. I-3855 (expressly finding that the arbitrator had this authority); see Norbert Reich, *Zur Wirksamkeit von Schiedsklauseln in Grenzüberschreitenden Börsentermingeschäften*, 12 Z. Eur. Pro. 981 (1996).

<sup>45</sup> *Seidel v. TELUS Commc'ns Inc.*, [2011] 1 S.C.R. 531 (Can.); Shelley McGill, *Consumer Arbitration After Seidel v. TELUS*, 51(2) CAN. BUS. L.J. 187 (2011).

*Seidel*, the contract contained a clause with the supplier referring disputes to “private and confidential arbitration,” as well as a waiver by the consumer of the right to pursue a class action claim.<sup>46</sup> Among the questions before the Supreme Court were whether this clause was unconscionable under the British Columbia Business Practices and Consumer Protection Act (BPCPA), and whether the waiver was in conformity with section 3 of the BPCPA, which provides: “Any waiver or release by a person of the person’s rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.”<sup>47</sup>

One of the questions before the Court was whether this prohibition had to be enforced by the arbitrator under the Canadian (and U.S.) *Kompetenz-Kompetenz* rule, or whether it could also be enforced by a court of law. The majority relied on section 172 of the BPCPA, which allows any person without “a special interest” to bring a class action for injunctive and declaratory relief.<sup>48</sup> The plaintiff in *Seidel* relied on this provision for her action against TELUS to avoid the arbitration clause and class action waiver. In interpreting the scope of section 172, the majority—against a strong dissenting opinion defending traditional principles of arbitration law—relied on the objective of the BPCPA, which is to confer consumer protection and enhance consumers’ access to justice.<sup>49</sup> This objective implicitly limits the *Kompetenz-Kompetenz* principle at least with regard to declaratory and injunctive relief. Therefore, the Court held that the class action waiver was dependent on the (annulled) arbitration clause; it could not be separated from it and could not exist without a valid arbitration clause.<sup>50</sup> The decision, however, made no reference to compensation or restitution where section 172 (3) is applicable only to a much more limited extent.

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<sup>46</sup> *Id.* ¶ 44.

<sup>47</sup> Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 (Can.).

<sup>48</sup> *Id.* § 172. The BPCPA also seems to contain broad standing provisions not dependent on the violated rights.

<sup>49</sup> *Seidel*, [2011] 1 S.C.R. 531.

<sup>50</sup> *Id.* ¶ 46.

### III. TO “PROPOSE” OR “IMPOSE” A SOLUTION: THE QUESTION OF E.U. LAW

EU Dir. 2013/11 provides for a two-tier mechanism for the out-of-court settlement of consumer disputes, which are described in Art. 2(1):

This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts and service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR-entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.<sup>51</sup>

“Propose” and “impose” are nearly identical terms, so they likely went nearly unnoticed in the (scant) debate of the Commission proposal of 20 November 2011 on the Directive,<sup>52</sup> which was adopted in the record time of little more than one and a half years. Both elements of the proposal and the final Directive were based on the internal market provision of Article 114<sup>53</sup> of the Treaty on the Functioning of the European Union (TFEU). The question of the correct legal basis will be further discussed in Section XII.

However, to “propose” a solution is quite different than to “impose” a solution. “Proposing” a solution is in line with the earlier initiatives by the Commission, which were based on Recommendations 98/257/EC of 30 March 1998 and 2001/310/EC

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<sup>51</sup> Directive 2013/11, art. 2(1) (emphasis added).

<sup>52</sup> Commission Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes, COM (2011) 793 final (Nov. 20, 2011).

<sup>53</sup> Art. 114 (1) TFEU gives the European Union jurisdiction “to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment or functioning of the internal market.” Consolidated Version of the Treaty on the Functioning of the European Union art. 114 (1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

of 4 April 2001.<sup>54</sup> These Recommendations were not applicable to entities who tried to “impose” a solution on consumers, e.g., binding consumer arbitration. In contrast, arbitration, including consumer arbitration, was expressly excluded from the scope of E.U. instruments concerning jurisdiction (Art. 1(2)(d) Regulation (EC) No. 44/2001 and now Art. 1(2)(d) of Regulation (EU) No. 1215/2012.<sup>55</sup> and applicable law (Art. 1(2)(e) of the Rome I-Regulation (EU) No. 593/2008).<sup>56</sup> These Regulations, however, were not based on the internal market competence of the E.U., but on its provisions of judicial cooperation in civil matters, which are limited to cross-border disputes under now Art. 81(2) of the TFEU.<sup>57</sup> The same is true of the Regulation (EC) No. 861/2007 of 11 July 2007 on a European Small Claims Procedure.<sup>58</sup>

Why this sudden extension of ADR procedures to consumer arbitration? How does this extension relate to the seemingly contradictory statement in Article 2(4) of Directive 2013/11, which reads: “This Directive acknowledges the competence of Member States to determine whether ADR entities established on their territories are to have power to impose a solution.”<sup>59</sup> An additional reservation is made in Recital (20) whereby an “out-of-court procedure which is created on an ad hoc basis for a single dispute between a consumer and a trader should not be considered as an ADR procedure.”<sup>60</sup> This excludes the commercial practice of setting up

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<sup>54</sup> Commission Recommendation 98/257, of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes 1998 O.J. (L 115) 31; Reich, *supra* note 1, ¶ 8.19, 8.22.

<sup>55</sup> Commission Regulation 1215/2012, of the European Parliament and the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1; Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC).

<sup>56</sup> Regulation 593/2008, of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (“Rome I”), 2008 O.J. (L 176) 6.

<sup>57</sup> TFEU art. 81(2).

<sup>58</sup> Council Regulation 861/2007, of 11 July 2007 on a European Small Claims Procedure, 2007 O.J. (L 199) 1.

<sup>59</sup> Directive 2013/11, art. 2(4).

<sup>60</sup> *Id.* at Preamble Directive 20.



special arbitration panels for more complex individual disputes as an option for consumer arbitration falling under Directive 2013/11.

#### IV. A FIRST ATTEMPT TO SOLVE THE CONUNDRUM ON CONSUMER ARBITRATION CREATED BY DIRECTIVE 2013/11

Dir. 2013/11 shows a certain contradiction concerning consumer arbitration: Member States are free to set it up, to continue existing instruments, or to completely abstain from doing so. If, however, Member States take an active view toward consumer arbitration, they are bound by the requirements of Directive 2013/11 in general, and Articles 10 and 11 in particular, which will be discussed in greater detail later in Sections VII and IX.

Article 10 and 11 only apply in cases where the plaintiff consumer is bound by an arbitration agreement, not if the trader himself initiates a claim in arbitration.<sup>61</sup> According to Article 2(1) and (2)(c) it is limited to actions in contract (with the exception of non-economic services of general interest), and excludes actions in tort and restitution with some doubts concerning borderline cases not to be discussed here. Injunctions against illegal behavior of traders sought by consumer associations are also excluded; they come under other E.U. law instruments, in particular Directive 2009/22/EU on injunctions.<sup>62</sup>

The principles contained in Directive 2013/11 are obviously minimum requirements under Art. 2(3). Within these limits, Member States are free to regulate consumer arbitration, e.g., regarding competence, costs, choice of arbitrators, etc. This is part of Member States' so-called "procedural autonomy," which has been recognized by the CJEU as a general principle of E.U. law.<sup>63</sup> On the other hand,

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<sup>61</sup> If the trader initiates a claim in arbitration, Directive 2013/11 is not applicable. *See* Directive 2013/11, art. 2(2)(g).

<sup>62</sup> Directive 2009/22, of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interests (recast), 2009 O.J. (L 110) 30.

<sup>63</sup> For an overview see REICH, *supra* note 5, ¶ 4.4; Norbert Reich, Hans-W. Micklitz, Peter Rott and Klaus Tonner, *Negotiation and Adjudication – Class Actions and Arbitration Clauses in Consumer Contracts*, in *EUROPEAN CONSUMER LAW* ¶ 8.3 (2d ed. 2014).

Member States must respect the principles of effectiveness and equivalence, which are now part of Article 47 of the E.U. Charter of Fundamental Rights—a subject matter to be discussed in Section XI.

V. THE LIMITS OF CONSUMER ARBITRATION: *CLARO* AND  
*ASTURCOM*

In *Claro*,<sup>64</sup> the CJEU goes quite far in the degree to which the national court of an E.U. Member State must engage in investigations on its own motion in arbitration proceedings.<sup>65</sup> When the consumer has agreed to an arbitration clause—the unfairness of which must be determined by national law, as could be seen from clause 1(q) of the Annex of the Unfair Terms Directive 93/13<sup>66</sup>—the consumer still cannot be drawn into arbitration against his will if this clause may be regarded as unfair. Annex 1 reads:

Terms that may be regarded as unfair . . .

(q) 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.<sup>67</sup>

The unfairness may also be invoked against traditional principle of the law of arbitration on the *Kompetenz-Kompetenz* of the arbitrator and not the national court having jurisdiction to determine the unfairness.

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<sup>64</sup> Case C-168/05, *E.M.M. Claro v. Centro Movil Milenium*, 2006 E.C.R. I-10421.

<sup>65</sup> Hans-W. Micklitz & Norbert Reich, *The Court and the Sleeping Beauty – The Revival of the Unfair Contract Terms Directive (UCTD)*, 51 *Common Mkt. L. Rev.* 771 (2014).

<sup>66</sup> Council Directive 93/13, of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29 (EC).

<sup>67</sup> *Id.*

In *Asturcom*, the CJEU quite adroitly used the principle of “equivalence” to guarantee a sort of “last resort” protection to the consumer: if national law allows the reopening of arbitration proceedings on the basis of public policy, the judge must consider the defenses available under E.U. consumer protection provisions which take the place of public policy.<sup>68</sup> Advocate General Trstenjak, who is in line with the Hungarian and the Spanish Governments<sup>69</sup> as well as the European Commission,<sup>70</sup> went even further in arguing that effective consumer protection requires the removal of *res judicata* in execution proceedings.<sup>71</sup>

The facts in *Claro* and *Asturcom* are somewhat different, as the consumer was drawn into arbitration proceedings by the trader that contained arbitration clauses. Directive 2013/11 expressly excludes this situation where the trader, not the consumer, takes his case to an entity that administers ADR. However, it seems that the principles developed in *Claro* and *Asturcom* can be generalized, especially concerning their challenges to the *Kompetenz-Kompetenz* doctrine.

Such a situation could arise under Directive 2013/11 where the consumer takes his complaint to a court of law, and the trader invokes the arbitration clause as a defense<sup>72</sup> to compel arbitration, provided the arbitration clause meets the requirements of Article 10 after the implementation of the Directive. The situation in *Asturcom* where a final arbitration award against a consumer can be challenged only under the limited requirements of the public policy (*ordre public*)

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<sup>68</sup> Case C-40/08, *Asturcom Telecomunicaciones v. Rodríguez Noguera*, 2009 E.C.R. I-9579. The extension of the public policy concept to “mere” mandatory law has remained controversial in doctrine. See the skeptical remarks by Vanessa Mak, *Harmonisation through “Directive Related” Case Law: the Role of the ECJ in the Development of European Consumer Law* 136-37 (Tilburg Inst. of Comparative & Transnational Law, Working Paper No. 2008/8, 2008); Mak, *supra* note 4, at 446. See also BÉLOHLÁVEK, *supra* note 4, at 32 (insisting on the difference between “public policy” and “public interest”: “consumer protection is associated with *public interest*; it is not subject to *public policy*). This distinction between public interest and public policy seems artificial and cannot be maintained under E.U. law autonomous interpretation principles.

<sup>69</sup> See Hungarian and Spanish Gov’t. Br. in *Asturcom* (on file with author).

<sup>70</sup> See European Com. Br. in *Asturcom* (on file with author).

<sup>71</sup> Advocate Gen. Trstenjak in *Asturcom*, *supra* note 4, at 58 et seq.

<sup>72</sup> “Schiedseinrede” in German. See Section XII, *infra*.

provision must be reshaped under the effectiveness test and not merely under the equivalence principle. This discussion illustrates that Directive 2013/11 does not address the real problems of consumer arbitration, and that the gaps left by E.U.-legislation must therefore be amended by recourse to general principles of E.U. law, namely the principle of effective legal protection.<sup>73</sup>

#### VI. WHAT ABOUT CONSUMER PROTECTION UNDER THE BRUSSELS MECHANISM OF JURISDICTION?

A consumer who wishes to have his claim against a trader located in another E.U. country arbitrated cannot rely on the jurisdiction of his home country, as would be the case under the Brussels regime. Directive 2013/11 does not contain rules on jurisdiction in cross-border conflicts, nor does it refer to the Brussels regime in a similar way as Art. 11 to the consumer protective provisions of Art. 6 of the Rome I-Regulation 593/2008 (see Section IX, *infra*).

Art. 7(1)(a) only requires ADR-entities to “make publicly available on their websites . . . clear and easily understandable information on . . . their contact details, including postal address and e-mail address.”<sup>74</sup> This provision—including the submission of claims online<sup>75</sup>—may be acceptable for optional complaint handling, but not for arbitration which may “impose solutions” to consumers. The impact of the risk to the consumer to lose his case is much more far-reaching because of the binding nature of the (non-)award by the arbitrator.

Article 15(1) lit c) of Regulation (EC) No. 44/2001 (Article 17(1) lit c) Regulation 1215/2012) provides that the consumer may sue the trader either at the trader’s place of domicile or at the business seat if “the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that

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<sup>73</sup> For further discussion of the principle of effective legal protection, see Section XI, *infra*.

<sup>74</sup> Council Directive 2013/11, art. 7(1)(a).

<sup>75</sup> Council Directive 2013/11, art. 5(2)(a).

Member State or several States including that Member State.”<sup>76</sup> There has been intense debate concerning this provision due to the issues raised by e-commerce, since the provision may be interpreted in such a way that the mere accessibility of the website of a company situated in one Member State by a consumer domiciled in another Member State may give such consumer the right to sue the company in the consumer’s domicile—a result which makes marketing by e-commerce subject to different and divergent jurisdictions. Therefore, the CJEU in *Pammer* distinguished between the mere accessibility of a website, which does not qualify as “directing activities,” and a non-exclusive list of criteria for determining “directing activities” where such a qualification is possible and must be established by competent national courts.<sup>77</sup> The trader may avoid being subject to multiple jurisdictions by making clear his intention to market his product or service only in certain countries to the exclusion of others, or by not making available his website in those excluded countries.

Jurisdiction clauses are regulated by Article 17 of Regulation 44/2001 resp. Article 19 of Regulation 1215/2012.<sup>78</sup> The rationale behind this provision is that such clauses in consumer contracts cannot be enforced before the litigation has commenced. A consumer does not lose privileged access to courts under Articles 15 and 16 by the jurisdiction clause.<sup>79</sup> This is in contrast to the general rule in Article 23 (Article 25 of Regulation 1215/2012), which allows jurisdiction clauses to be enforced if entered into in writing or by electronic means.<sup>80</sup> However, Article 23 is not applicable to consumer arbitration.

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<sup>76</sup> Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters art. 15(1)(c), 2000 O.J. (L 012) 1 (EC).

<sup>77</sup> Joined Cases C-585/08 and C-144/09, Peter Pammer et al. v. Reederei Karl Schlüter et al., 2010 E.C.R. I-12527; Eva-Maria Kieninger, *Grenzenloser Verbraucherschutz?*, in LIBER AMICORUM U. MAGNUS 449, 455 (2014) (interpreting “direct activities” as “activity directed at a certain objective” (“*Zielgerichtete Tätigkeit*”).

<sup>78</sup> Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 17, 2001 O.J. (L 012) 1 (EC).

<sup>79</sup> *Id.* art. 15-16.

<sup>80</sup> *Id.* art. 23; see also Case C-322/14, Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH, [2015] W.L.R.(D) 222.

The gap left by the—insufficient—provisions on consumer arbitration in Directive 2013/11 must be filled by reference to the general fairness standards as developed under Directive 93/13, which will be discussed in Section IX. In my opinion, no difference should be made whether the action is brought by the consumer or the trader, or whether the two are joined in a single case.

#### VII. THE “SPECIFIC ACCEPTANCE” OF THE ARBITRATION AGREEMENT BY THE CONSUMER

The most important provision for consumer protection in Directive 2013/11 follows the classical paradigm of the “informed EU consumer.”<sup>81</sup> Article 10 explicitly requires specific acceptance by the consumer for arbitration clauses in consumer to business (C2B) disputes, which may be extended by Member States both horizontally to a business to consumer (B2C) conflict and vertically by imposing additional requirements on this specific acceptance. Article 10 reads:

(1) Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

Member States shall ensure that in ADR procedures which aim at resolving a dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solution are binding on traders.<sup>82</sup>

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<sup>81</sup> See STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* 92 (2d ed. 2013); HANS W. MICKLITZ ET AL., *UNDERSTANDING EU CONSUMER LAW* ¶ 1.35 (2d ed. 2013).

<sup>82</sup> Directive 2013/11, art. 10.

It seems as though the intention of the E.U.-legislator was to exclude pre-dispute arbitration clauses, which are common in the U.S.<sup>83</sup> The wording of Art. 10(1) refers to a “dispute” having “materialised.”<sup>84</sup> Before that event, the clause would not be binding on the consumer. Can the same strict interpretation of this concept of non-binding be applied similar to Article 6 of the Unfair Terms in Consumer Contracts Directive (UTCC) 93/13 where, according to case law of the CJEU, the court must *ex officio* disapply the unfair contract term?<sup>85</sup> This will have to be decided by the CJEU, but such analogy seems reasonable given the similarity of the formulation in Article 6 of the UTCC and Directive 2013/11.

Under a strict literal construction of Article 10, there is no “dispute” to be resolved before the conclusion of a contract. This is only the case once consumer complaints arise during contract execution. Consumer arbitration clauses therefore only operate once a specific dispute has arisen between the trader and the consumer. Both parties may have good reasons to take their conflict to arbitration, e.g., because of the speed or lower costs of getting a (binding) decision, but the consumer should not be forced to do so before a “dispute has materialised.”<sup>86</sup>

What does “specific acceptance” mean? Recital 43<sup>87</sup> does not provide an answer. A similar provision, however, is contained in Article 8(2) of the Draft Regulation of a Common European Sales Law (CESL), which requires an “explicit statement which is separate from the statement indicating the agreement to conclude a contract.”<sup>88</sup> This statement may be concluded in electronic form, but the trader must notify the consumer of its binding nature on a durable medium, e.g., a

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<sup>83</sup> According to BĚLOHLÁVEK, *supra* note 4, at 385, this was not the case with EU law before Dir. 2013/11.

<sup>84</sup> Directive 2013/11, art. 10(1).

<sup>85</sup> See Micklitz & Reich, *supra* note 66 at 780.

<sup>86</sup> Directive 2013/11, art. 10(1).

<sup>87</sup> Recital 43 of the Preamble to Directive 2013/11.

<sup>88</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final, art. 8(2), (Oct. 22, 2011); Hans-W. Micklitz & Norbert Reich, *The Commission Proposal for a Regulation on a Common European Sales Law (CESL) – Too Broad or not Broad Enough?* 29 (LAW, EUI Working Papers No. 4, 2012).

mere hyperlink would not be enough.<sup>89</sup> On the other hand, the statement must be clearly separated from the contract terms, even if it is contained in a “term not . . . individually negotiated” according to Article 3(2) of Directive 93/13.<sup>90</sup> A mere button solution, or so called “click-wrap clauses,”<sup>91</sup> which are popular in U.S. licensing agreements, are not acceptable in E.U. law, which in Article 10(2) of Directive 2013/11 has set a minimum standard not to be undermined by Member States’ law.

“Specific acceptance” has imposed an E.U. standard, subject to CJEU’s interpretation. However, under *Guy Denuit*, an arbitration panel or ADR-entity authorized to “impose” solutions cannot make reference to the CJEU under Article 267 of the TFEU.<sup>92</sup> This paradoxical result warrants a critical assessment of the traditional rule of (commercial) arbitration that the arbitrator, not the court, has *Kompetenz-Kompetenz* concerning the validity of the arbitration agreement, at least in consumer matters, to be scrutinized under fundamental rights aspects later discussed in Section XII.

Since the requirements for “specific acceptance” in Article 3(2) of Directive 2013/11 are minimal, Member States can increase these requirements, e.g., by requiring written form or signature requirements, or can limit the scope of arbitration clauses, e.g., by prohibiting them for certain risky financial transactions<sup>93</sup> or imposing a financial cap on

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<sup>89</sup> Case C-49/11, *Content Services Ltd. v. Bundesarbeitskammer*, 2011 EUR-Lex CELEX LEXIS 660 (Feb. 3, 2011).

<sup>90</sup> Council Directive 93/13, of 5 April 1993 on Unfair Terms in Consumer Contracts, art. 3(2) 1993 O.J. (L 095) 29 (EC).

<sup>91</sup> Click-wrap clauses are defined as “another form of creating an electronic agreement, except that the license is included on the computer screen before installation rather than on the box. By clicking on a button that says “I agree” or “I accept,” the licensee agrees to the terms of use of the contract. An important difference between click-wrap agreements and shrink-wrap agreements is the fact that the user actually has an opportunity to read the contract before using or installing the program.” See Reich, *A ‘Trojan Horse’ in the access to Justice? – Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU? supra* note 1, and now Case C-322/14 *Jaoud El Majdoub v CarsOntheWeb.Deutschland GmbH*, [2015] W.L.R.(D) 222..

<sup>92</sup> Case C-125/04, *Guy Denuit et al v. Transorient voyages et Culture SA* 2005 E.C.R. I-925.

<sup>93</sup> This was done in Germany. See the discussion *infra* Section XII.



their use.<sup>94</sup> Member States can also introduce rules on territorial or local jurisdiction, which are not precluded by the Brussels regime not applicable to arbitration.

#### VIII. E.U. STANDARDS BEYOND “SPECIFIC ACCEPTANCE”

The above-mentioned *Claro* and *Asturcom* cases did not concern the validity of the arbitration agreement, but left this issue to applicable Member States. This will change once Directive 2013/11 is implemented by Member States into their national law, which should occur by July 9, 2015. Can E.U. unfair terms legislation be applied beyond the mere information model<sup>95</sup> of Directive 2013/11? Would a national court be required to control *ex officio* under the unfairness test arbitration clauses, which impose substantial inconveniences on the consumer since arbitration is likely to result in excessive costs or will force the consumer to take the case to an ADR-entity far away from his residence (similar to the *Bragg* case)? It is well-known that E.U. law is strict in banning jurisdiction clauses which force the consumer to take his case to a court away from his habitual residence resulting in a *de facto* denial of access to justice.<sup>96</sup> On the other hand, the trader may have an efficiency interest to concentrate arbitration proceedings at his place of business.

Article 3(1)<sup>97</sup> is not clear on how a possible relationship between Directive 2013/11 and Directive 93/13 can be reconciled. The provision is only concerned with “conflicts,” not with additional requirements imposed by national law under the minimum protection clause,<sup>98</sup> even if based on CJEU practice obliging Member States’ courts to control *ex officio* the fairness of pre-formulated contract terms. If the “specific acceptance” is contained in such a pre-formulated (yet separate) term, it is therefore subject to the *ex officio* control doctrine of the CJEU. Much will depend on the circumstances of the arbitration

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<sup>94</sup> This was done by the U.K. See the discussion *infra* Section XV.

<sup>95</sup> See Reich et al, *supra* note 65, ¶ 1.11.

<sup>96</sup> See Case C-137/08, VB Pénzügyi Lízing Zrt. V. Ferenc Schneider 2010 E.C.R. I-847; Wulf-Henning Roth, *Case 137/08 VB Pénzügyi Lízing Zrt v Ferenc Schneider*, 7 Eur. Rev. Contract L. 425 (2011); Micklitz & Reich, *supra* note 66, at 789.

<sup>97</sup> See Directive 2013/11.

<sup>98</sup> Council Directive 93/13, of 5 April 1993 on Unfair Terms in Consumer Contracts, art. 8 1993 O.J. (L 095) 29 (EC).

agreement. The main issue will always be whether the agreement makes the enforcement of consumer rights easier and less burdensome, which is the very objective of Directive 2013/11 under Article 1. In other words, the issue is whether such agreement puts additional constraints on the consumer's enforcement of his rights under E.U. and national law that contradict the fairness criteria of Article 3 of Directive 93/13. It cannot be presumed that Article 3(1) Directive 2013/11 intended to preclude the unfairness test as a general standard of E.U. civil law.

An open question remains as to how cross-border arbitration clauses can be controlled under the unfairness concept. As a general rule, arbitration is exempted from the applicability of Regulation 44/2001, Article 1(2) lit d). On the other hand, the effect of jurisdiction clauses in consumer contracts has been severely limited by the Regulation. Should these principles be applied per analogiam under the unfairness standard to arbitration clauses, which may have a similar effect on the consumer's right to have his case heard in his home jurisdiction if the conditions of Article 17 of Regulation 44/2001 (in the future: Article 19 Regulation 1215/2012) are met? There is indeed no reason to argue against such analogy because, for the consumer, it does not make any difference whether the denial of his home jurisdiction before litigation is effected through a jurisdiction or arbitration clause.<sup>99</sup> The exemption of arbitration from the scope of application of the Brussels instruments is intended to privilege commercial arbitration, but not to deprive the consumer of his right to a defense and a fair hearing. This reasoning limits the use of arbitration clauses in cross-border contracting.

#### IX. APPLICABLE LAW: (LIMITED) FREE CHOICE BY ARBITRATORS OR RESERVATION OF MANDATORY PROVISIONS?

Under traditional arbitration law, in particular in commercial matters, the parties are free to determine the applicable law, including commercial usages or principles of equity. Article 7(1)(i) of the Directive 2013/11 put this problem under the heading of "transparency" for all ADR entities, including consumer arbitration:

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<sup>99</sup> Reich, *More clarity after "Claro"?*, *supra* note 1, at 45.

Member States shall ensure that ADR entities make publicly available on their websites, on a durable medium . . . , and by any other means they consider appropriate, clear and easily understandable information on . . . the types of rules the ADR entity may use as a basis for the dispute resolution (for example legal provisions, considerations of equity, codes of conduct).<sup>100</sup>

In addition, Article 6(1)(a) provides that the arbitrator need not be a lawyer or a person trained in law, but should at least have a “general understanding of law.”<sup>101</sup> These are minimum standards, which can be enhanced by Member State laws on consumer arbitration, e.g., by restricting the reference to equity or codes of conduct or by demanding that arbitrators have legal training. The application of mandatory provisions of consumer law is regulated by provisions on “legality” in Article 11. Article 11 concerns two situations: (a) purely internal situations where mandatory consumer law provisions must be applied, even if parties expressly opted out in the contract; and (b) cross-border disputes where the rules on applicable law in Regulation 593/2008<sup>102</sup> are normally excluded for arbitration agreements. Article 11 (1)(a)-(b) provides:

Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer: (a) in a situation where there is no conflict of laws, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident, (b) in a situation involving conflict of laws, where the law applicable to the sales or service contract is determined in accordance with Article 6(1) and (2) of Regulation (EC) No 593/2008, the solution imposed by the ADR entity shall not result

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<sup>100</sup> Directive 2013/11, art. 7(1)(i).

<sup>101</sup> *Id.* art. 6(1)(a).

<sup>102</sup> Commission Regulation 593/2008, 2008 O.J. (L 177) 6 (providing regulations on the law applicable to contractual obligations (Rome I)).

in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which he is habitually resident.<sup>103</sup>

This provision will be welcomed by E.U. lawyers if compared with the traditional arbitration principles contained in U.S. law where the arbitrator can be exempted from applying mandatory provisions, and where legality control is only possible in final recognition proceedings under a narrow *ordre public* and related concepts.<sup>104</sup> Although the CJEU has tried to extend this concept to mandatory E.U. law both in commercial<sup>105</sup> and consumer<sup>106</sup> disputes, case law has remained unsettled and may not cover the entire scope of mandatory E.U. consumer law. It also comes late after the entire arbitration proceedings have been terminated, and it requires additional activity (and costs!) by the consumer.

In my opinion, the legality requirement of consumer arbitration can only be fulfilled if Member States grant a remedy to the consumer to challenge an incorrect application of mandatory provisions by the arbitrator. The following situations may arise:

- The consumer (or a group of consumers) brings a claim against the trader before a court of law, but the trader falsely invokes the arbitration agreement (the so-called *Schiedseinrede*).
- The claim of the consumer is rejected (or reduced) by the arbitrator based on a false application of mandatory consumer law against Article 11 of Directive 2013/11; the consumer wants to challenge this rejection before a court of law, which may be impossible under existing arbitration legislation.

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<sup>103</sup> Citation to the quoted provision.

<sup>104</sup> See discussion of U.S. law *supra* Section I.

<sup>105</sup> See Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l N.V.*, 1999 E.C.R. I-3055.

<sup>106</sup> See Case C-40/08, *Asturcom Telecomm. v. Rodríguez Noguera*, 2009 E.C.R. I-9579.

In practice, the most frequent situation is concerned with the trader—particularly in a long-term contract—using the arbitration mechanism to adjudicate his claims, as in *Claro* and *Asturcom*. These situations, however, are not covered by Directive 2013/11.

A fundamental rights analysis will help to resolve these situations to avoid the fact that arbitration clauses are sometimes abused, as in the U.S., by traders to restrict consumers' access to class claims for their individual claims. Section XI will provide a further discussion of the fundamental rights analysis.

## X. “SOFT” LEGAL PROTECTION

Article 8 of Directive 2013/11 also contains some protective provisions. However, Article 8 does not have the force of law, and instead provides standards for good ADR practice subject to the monitoring and reporting requirements in Article 20:

the ADR procedure is free of charge or available at a nominal fee for consumers, lit (c); and

the outcome of the ADR procedure is made available within a period of ninety calendar days from the date of which the ADR entity received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the ninety calendar day time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute.<sup>107</sup>

These standards are standards flexible formulations applicable to consumer arbitration. Member States have discretion as to whether and how they implement them. Article 20 contains basic rules for sound ADR systems as an alternative to going to court and provide for inexpensive and quick adjudication. If practice in one Member State shows that this objective cannot be obtained by the existing consumer arbitration mechanism, it would be unfair to force the consumer to

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<sup>107</sup> Directive 2013/11, art. 20.

refer his claims to such arbitration even if the standards of “specific acceptance” under Article 10(2) of Directive 2013/11 are met. Of course, the requirements in Article 20 can be used as recommendations on how to interpret Member State law implementing E.U. law under the *Grimaldi* doctrine.<sup>108</sup>

XI. THE CONSTITUTIONAL DIMENSION: DIRECTIVE 2013/11  
ARTICLE 47 CHARTER

The constitutional dimension of ADR proceedings has been expressly included in Recital 61 of Directive 2013/11, which reads: “[t]his Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Articles 7, 8, 38 and 47 thereof.”

Recital 45 refers to Article 47 concerning access to courts of law—a principle reiterated in Article 12(1) of Directive 2013/11.<sup>109</sup> This conforms to *Alassini*, which concerns a requirement in Italian law for consumer complaints against telecommunication operators to first make use of ADR/ODR proceedings, as foreseen in Directive 2002/22,<sup>110</sup> before going to court.<sup>111</sup> The Court discussed this requirement, considering both the equivalence and the effectiveness principle, but did not find a violation of either principle. At the same time, the CJEU insisted on the consumer’s right to take his case to court:

Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal

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<sup>108</sup> Case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, 1989 E.C.R. I-4497. This case involves the indirect relevance of Commission recommendations in interpreting E.U. or national law.

<sup>109</sup> *Id.* at recital 45, art. 12(1).

<sup>110</sup> Directive 2002/22, *Universal Service Directive*, 2002 O.J. (L 108) 51 (EC).

<sup>111</sup> Case C-317/08, *Alassini v. Telecom Italia*, 2009 E.C.R. I-2214.

proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.<sup>112</sup>

*Alassini* concerned ADR proceedings, which could only “propose,” not “impose,” solutions on the consumer. The wording of the decision, however, certainly shows hostility against ADR proceedings resulting in unreviewable and binding decisions. This wording—even though not discussed in detail in the judgment itself—is inconsistent with the traditional principles of arbitration under the New York Convention, namely that the arbitrator has the *Kompetenz-Kompetenz* to decide whether he has adjudicatory authority over the case, and that an award can usually only be refused recognition on the very narrow ground of “public policy (*ordre public*),” excluding the non-observance of mandatory rules of procedure or substantive consumer protection.

Can these traditional principles of arbitration law be upheld under the rules of consumer arbitration as provided by Directive 2013/11, particularly Articles 10 and 11? I do not think so. This directive is also concerned with a specific aspect of the constitutionalization of civil law, namely, the principle of effectiveness of Article 47 of the E.U. Charter, which provides: “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”<sup>113</sup>

Article 19(1) of the TEU puts the responsibility for “providing remedies sufficient to ensure effective legal protection in the fields covered by Union law” on Member States through the status of their courts of law as “Union courts.”<sup>114</sup> The agreement to arbitrate, as a private matter decided by parties, cannot waive the constitutional

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<sup>112</sup> *Id.* ¶ 67.

<sup>113</sup> Charter of Fundamental Rights of the European Union, art. 47, Dec. 18, 2000, 2000 O.J. (C 364) 1.

<sup>114</sup> Treaty on the European Union, Dec. 7, 2007, 2012 O.J. (C 326) 1 [hereinafter TEU].

requirements of effective legal protection by access to national courts of law. The remedies, which are provided indirectly by arbitration concerning the *Kompetenz-Kompetenz* of the arbitrator, do not suffice to fulfill these constitutional requirements of E.U. law. The consumer must always have the possibility to challenge a decision of the arbitrator even if he has in principle agreed to the arbitration proceedings by respecting Article 10(2) of Directive 2013/11 or an equivalent national provision. Agreement by “specific acceptance” does not mean a total preclusion of the right to effective legal protection, which the national judge must guarantee under the *ex-officio* doctrine. Under the “remedial function” of Article 47 of the E.U. Charter and Article 19(1)(2) of the TEU,<sup>115</sup> Member States must establish remedies protecting the legitimate interests of the consumer that ensure that the mandatory requirements of consumer arbitration are met.<sup>116</sup> The freedom of Member States to regulate consumer arbitration under Article 2(4) of Directive 2013/11 should be limited by the fundamental rights protected by E.U. law. Therefore, it is reasonable to conclude that:

- The validity of an arbitration agreement both from a formal and a substantive view is ultimately a matter to be decided by courts, not the arbitrator.
- In consumer arbitration, the *Kompetenz-Kompetenz* belongs to the competent court, not the arbitrator.
- Decisions of the arbitrator to reject or limit a claim of the consumer under Directive 2013/11 can be challenged before courts of law, in particular in case of breach or non-observance of mandatory provisions.
- The national judge hearing a case involving consumer arbitration must *ex officio* apply the mandatory provisions of E.U. and national law, even if not raised by the consumer.

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<sup>115</sup> See REICH, *supra* note 5, at 4-10.

<sup>116</sup> *Id.* (this seems to be recognized by the Court in *Claro* and *Asturcom*, even though not based on Article 47 of the E.U. Charter or Article 19 of the TEU, which were not in force at the time of decisions, but rather the traditional principles of effectiveness and equivalence).



- The scope of Article 47 of the E.U. Charter and Article 19(1)(2) of the TEU is not limited to arbitration under Directive 2013/11, but can be extended to any consumer arbitration, in particular in cases brought by the trader against the consumer before an arbitrator (B2C—the *Claro/Asturcom* situations).

## XII. IMPACT OF DIRECTIVE 2013/11 ON MEMBER STATE LAW ON CONSUMER ARBITRATION IN GERMANY

The German law on arbitration clauses in consumer contracts<sup>117</sup> begins with a “form model” of consumer protection.<sup>118</sup> Sections 1029 and 1031 of the *Zivilprozessordnung* (ZPO, Code on Civil Procedure), as amended in 1997, allow arbitration clauses if they have been documented sufficiently well. Arbitration agreements which involve consumers “must be contained in a document signed by the parties themselves.”<sup>119</sup> The signature of an agent is not enough.<sup>120</sup> The written form can be substituted by the electronic form according to Section 126a of the *Bürgerliches Gesetzbuch* (BGB, Civil Code), as amended.<sup>121</sup> The written or electronic document may not contain any other contractual clauses. Germany has not made any reservation under the New York Convention of 1958 to exclude consumer contracts. Therefore, the legal regime for arbitration in Germany is the

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<sup>117</sup> See generally CHRISTOPHER HODGES, IRIS BENÖHR & NAOMI CREUTZFELDT-BANDA, CONSUMER ADR IN EUROPE: CIVIL JUSTICE SYSTEMS 73 (2012) (explaining the German “arbitration” system, but is more concerned with conciliation and mediation (*Schlichtung* in German), not with binding arbitration as understood here); Norbert Reich, *Consumer ADR in Europe: Civil Justice Systems*, 50 Common Mkt. L. Rev. 913 (2013) (reviewing CHRISTOPHER HODGES, IRIS BENÖHR, & NAOMI CREUTZFELDT-BANDA, CONSUMER ADR IN EUROPE: CIVIL JUSTICE SYSTEMS (2012)).

<sup>118</sup> WEIHE, *supra* note 8, at 155-58.

<sup>119</sup> ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, REICHSGESETZBLATT [RGBL.] 83, as amended, § 1031(5) (Ger.) [hereinafter ZPO].

<sup>120</sup> *Id.*

<sup>121</sup> BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] 195, as amended, § 126a (Ger.).

same whether or not a consumer is part of an arbitration agreement meeting the form requirements.<sup>122</sup>

The provision in Section 1031(5) of the ZPO is similar to Article 10(2) of Directive 2013/11,<sup>123</sup> although the latter does not require signature or an electronic equivalent. However, Article 2(3) of Directive 2013/11 allows Member States to impose more stringent provisions on consumer arbitration,<sup>124</sup> including a requirement that the document should only contain clauses concerning the arbitration agreement as such. German law does not use the term “specific acceptance,” but it seems that this is exactly what is meant by the German legislature in an E.U.-conforming interpretation. It is obvious that the arbitration agreement must be separated from other contract clauses; however, there is no prior notification requirement which must be included in the arbitration document.

Concerning the *Kompetenz-Kompetenz* of the arbitrator, German law contains a compromise solution somewhat different from Directive 2013/11. Under Section 1032(1) of the ZPO, the arbitration agreement precludes any action before a court of law (*Schiedseinrede* in German), unless it is “void, ineffective or inoperative” (*nichtig, unwirksam oder undurchführbar*).<sup>125</sup> However, this “*Schiedseinrede*” must be expressly raised by the defendant before oral proceedings in court. This provision is not in line with the case law of the CJEU, which requires an *ex officio* intervention of the court who does not have to wait for an action of the consumer.<sup>126</sup>

On the other hand, Section 37h of the WpHG (*Wertpapierhandelsgesetz*, law on securities transactions), as amended, restricts arbitration clauses concluded before litigation to persons acting in commerce (“*Kaufleute*”) and legal persons of public law, thus excluding consumer transactions in investment services from

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<sup>122</sup> Jürgen Samtleben, *Zur Wirksamkeit von Schiedsklauseln bei grenzüberschreitenden Börsentermingeschäften*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEUP] 974, 975 (1999) (Ger.).

<sup>123</sup> ZPO, § 1031(5).

<sup>124</sup> Directive 2013/11, art. 2(3).

<sup>125</sup> ZPO, ¶ 1032(1).

<sup>126</sup> REICH, *supra* note 5, ¶¶ 4, 16.

arbitration clauses.<sup>127</sup> Its legislative rationale is controversial<sup>128</sup> and beyond the scope of this paper. According to an earlier opinion of Samtleben,<sup>129</sup> the WpHG's international sphere of application is determined by the normal place of residence of the private investor. If the place of residence is Germany, the arbitration clause is not effective, and the consumer will be able to take his claim to the courts of his country of residence according to Articles 15 and 16 of Regulation 44/2001 (Article 17 and 18 of Regulation 1215/2012). The arbitration clause prohibition contained in Section 37h of the WpHG is consistent with the general power of Member States to regulate consumer arbitration in Article 2(4) of Directive 2013/11, including prohibiting it with regard to certain transactions (investment services). This prohibition is also enforceable against a foreign arbitration agreement, which need not be respected by the German *judex a quo* under the provision concerning the application of "overriding mandatory provisions" under Article 9 of Rome I-Reg.<sup>130</sup>

This rather liberal and generous approach to arbitration clauses in consumer contracts (with the exception of investment services) taken by the ZPO was confirmed by the German Bundesgerichtshof (BGH) with regard to the admissibility arbitration clauses under the special legislation on unfair contract terms, now included in the

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<sup>127</sup> Wertpapierhandelsgesetz [WpHG] [Law on Securities Transactions], Sep. 9, 1998, REICHSGESETZBLATT [RGL.] 1842, as amended, § 37h (Ger.).

<sup>128</sup> For different views on German legal literature, see Rolf Sethe, § 37h WpHG (*Schiedsabreden*), in WERTPAPIERHANDELSGESETZ (WPHG) ¶ 7, (Heinz-Dieter Assmann & Uwe H.Schneider eds., 6th ed. 2012) (examining "excessive investor protection"); Rainer Hausmann, *Schiedsvereinbarungen*, in INTERNATIONALES VERTRAGSRECHT ¶ 3469 (Christoph Reithmann & Dieter Martiny eds., 7th Ed. 2014); Jürgen Samtleben, *Das Börsentermingeschäft ist tot – es lebe das Finanztermingeschäft?*, 15 Zeitschrift für Bank- und Börsenrecht 69, 76 (2003) (taking a more neutral approach). Compare WEIHE, *supra* note 8, at 141 (arguing that § 37h WpHG expresses a general principle of consumer protection), with Klaus Peter Berger, *Schiedsgerichtsbarkeit und Finanztermingeschäfte – Der "Schutz" der Anleger vor der Schiedsgerichtsbarkeit durch § 37h WpHG*, 15 Zeitschrift für Bank- und Börsenrecht 77, 85 (2003) (taking a more liberal approach). The author agrees with Weihe because of the particular risks of transactions for the consumer covered by this provision, which may not be adequately addressed by the arbitrator.

<sup>129</sup> WEIHE, *supra* note 8, at 77.

<sup>130</sup> See generally Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, 2013 EUR-Lex CELEX Lexis 4306 (Oct. 17, 2013) (interpreting Rome I-Reg).

BGB.<sup>131</sup> According to the BGH, an arbitration clause cannot impose an unfair disadvantage on the consumer.<sup>132</sup> The consumer is protected by the form requirement of Section 1031(5) of the ZPO, which should warn him against the risk of an arbitration clause.<sup>133</sup> It is, in the opinion of the BGH, not necessary that the user of the arbitration clause shows a special interest in it. Unlike jurisdiction clauses, arbitration clauses in consumer contracts may be concluded before the dispute arises. The BGH also refers to Point 1(q) of the indicative list of the Annex of Directive 93/13,<sup>134</sup> where arbitration clauses are only condemned if they concern disputes taken to arbitration “not covered by legal provisions;” the rules of the ZPO, in the opinion of the BGH, must be regarded as such provisions.<sup>135</sup> The BGH also insists that the arbitration clause regulates access to arbitration in a fair and impartial manner.<sup>136</sup>

Even if in the case before the BGH the arbitration clause may not have been unfair (the litigation concerned disputes involving losses out of a speculative investment scheme of about 125.000 euro), the judgment should not be generalized as allowing arbitration clauses in any type of consumer dispute if the mere form requirements of Section 1031(5) of the ZPO are met. This is particularly true if the costs of arbitration are substantial in relation to the sum in litigation and amount to a de facto denial of justice. The same is true with regard to the choice of the arbitrator, which gives an unfair advantage to one party against the consumer.<sup>137</sup> These questions will now have to be measured against the requirements set up in Articles 10 and 11 of Directive 2013/11 in the interpretation advanced in this paper (*supra* VII/VIII). The BGH may have to reconsider its liberal opinion towards arbitration clauses in future cases.

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<sup>131</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 10, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1125, 2005 (Ger.); WEIHE, *supra* note 8, at 278.

<sup>132</sup> *See id.*

<sup>133</sup> WEIHE, *supra* note 8, at 187 (regarding existing German practices).

<sup>134</sup> *Id.* at 1127.

<sup>135</sup> *Id.* at 1127.

<sup>136</sup> *Id.*

<sup>137</sup> Oberlandesgericht Düsseldorf (OLGDü) [Higher Regional Court of Düsseldorf] June 1, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 400, 1996 (Ger.).

## XIII. THE SPANISH APPROACH

As Claro shows, arbitration clauses in consumer contracts may be declared void by Member States according to the so-called indicative list,<sup>138</sup> even though there is no formal obligation to do so.<sup>139</sup> This has been done in Spain. However, arbitration clauses in pre-formulated consumer contracts are always possible where the dispute is referred to “arbitration bodies established by statutory provision in respect of a specific sector or circumstances.”<sup>140</sup> Spanish Law has established a “Sistema Arbitral de Consumo” in Article 31 of the Consumer Protection Law of 1984, implemented by the Real Decreto 636/1993, modified by Decreto 60/2003.<sup>141</sup> It provides for arbitration panels (*colegio arbitral*) to be established by national and regional “Juntas Arbitrales de Consumo.”<sup>142</sup> These panels are composed of a President (representing the competent administration), a consumer representative, and a business association representative. Hence, Spanish law prioritizes certain recognized consumer arbitration bodies<sup>143</sup> to which the arbitrator “agreed to” by Ms. Claro in her dispute with a mobile telephone company did not belong.

The Spanish system was modified by Real Decreto 231/2008, which defines the functions, composition, competences, and procedures of consumer arbitration boards.<sup>144</sup> The use of the arbitration system is voluntary for the parties. First, an arbitration

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<sup>138</sup> Council Directive 93/13, of 5 April 1993 on Unfair Terms in Consumer Contracts, Annex 1 lit. q, 1993 O.J. (L 095) 29 (EC).

<sup>139</sup> See Case C-478/99, *Comm’n v. Sweden* 2002 E.C.R. I-4147 ¶ 20.

<sup>140</sup> See Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, 2013 EUR-Lex CELEX LEXIS 4306 (Oct. 17, 2013).

<sup>141</sup> See MANUEL-ANGEL LOPEZ SANCHEZ ET AL., *SERVICIOS FINANCIEROS, PROTECCION DEL CONSUMIDOR Y SISTEMAS EXTRAJUDICIALES DE RESOLUCION DE CONFLICTOS IN ESPAÑA* 119-170 (1995); see also WEIHE, *supra* note 8, at 119; Cavier Favre-Bulle, *Arbitrage et règlement alternatif des litiges (ADR): une autre justice pour les consommateurs?*, in *DROIT DE LA CONSOMMATION*, LIBER AMICORUM BERND STAUDER 95, 113 (2006).

<sup>142</sup> LOPEZ-SANCHEZ, *supra* note 142, at 142-48.

<sup>143</sup> See Ewoud Hondius, *Towards a European Small Claims Procedure?*, in *LIBER AMICORUM BERND STAUDER*, 135 fn 36 (Luc Thévenoz & Norbert Reich, eds. 2006).

<sup>144</sup> HODGES ET AL., *supra* note 118, at 213.

request form must be filled out by a consumer, his lawyer, or a consumer association. This form requirement conforms to Article 10(2) of Directive 2013/11. Usually the arbitration board correlates to the consumer's residence. The use of arbitration is free of charge for both consumers and businesses, with the exception of discovery, and procedures usually do not take longer than six months. As with a court judgment, the parties can appeal an arbitration decision within two months. In addition, appeals can be brought based on decisions by the Junta Arbitral del Consumo to accept or reject requests for arbitration of consumer disputes. As an overall principle, Spanish law does not recognize the *Kompetenz-Kompetenz* of the arbitrator, and therefore is consistent with the approach advanced in this paper based on Article 47 of the E.U. Charter and Article 19 of the TEU.

The Spanish consumer arbitration system has created a second tier of legal protection for consumers and is similar to a court system, including the necessary guarantees of legality and effective legal protection. It could serve as a model for other E.U. countries wanting to implement the consumer arbitration provisions of Directive 2013/11 in a way suggested in this paper.

#### XIV. A REGULATED APPROACH: FRANCE

According to French law, an arbitration clause (*clause compromissoire*) in a consumer contract is invalid and cannot be enforced against the consumer. This is derived from Article 2061 of the French Civil Code, modified by Law of 15.5.2001, whereby “la clause compromissoire est valable dans les contrats conclus à raison d’une activité professionnelle.”<sup>145</sup> However, in cross-border transactions Article 2061 is not applicable, so the French Cour de Cassation<sup>146</sup> has taken a more liberal approach. French scholars criticize this approach as “paradoxale” because the consumer enjoys less protection in cross-border relations even though such relations are more dangerous. French scholars also refer to legislation on unfair contract terms,

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<sup>145</sup> HENRI TEMPLE & JEAN CALAIS-AULOY, DROIT DE LA CONSOMMATION ¶ 497 (9th ed., 2015) (“the arbitration clause is valid in a contract concluded because of a professional activity”).

<sup>146</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 5, 1999, Bull. Civ. I, no. 31 (Fr.).

namely to the above mentioned Point 1(q) of the indicative list of the Annex of Directive 93/13; this is interpreted as a blacklist, even though the French legislature formally did not go so far.<sup>147</sup> This argument, however, was not considered by the ECJ in *Claro*.<sup>148</sup>

It unclear whether and how French law will be modified in implementing Directive 2013/11. However, the prohibition of the arbitration clause in B2C contracts can be maintained according to Article 2(4) of Directive. 2013/11 since “[t]his Directive acknowledges the competence of Member States to determine whether ADR entities established on their territories are to have the power to impose a solution.”

## XV. A COMPROMISE: U.K. LAW

U.K. law takes a nuanced approach to arbitration clauses in consumer contracts. The Arbitration Acts of 1996 permit only a limited right of appeal from an arbitrator’s decision to courts of law.<sup>149</sup> In particular, clauses binding consumers in advance to arbitration for sums less than £5,000 are not allowed.<sup>150</sup> The original provision under the Consumer Arbitration Agreements Act of 1988 exempted “non domestic arbitration agreements” from the requirements of this rule; however, the Court of Appeal extended it to consumers from other E.C. countries to avoid a discrimination based on nationality.<sup>151</sup>

Arbitration has been frequently included in Codes of Practice as a low cost dispute resolution scheme, but abuses of arbitration led to the 1996 Spanish arbitration law amendments, which imposed a cap on pre-formulated arbitration clauses. Therefore, ombudsmen

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<sup>147</sup> TEMPLE & CALAIS-AULOY, *supra* note 146, at 72.

<sup>148</sup> See generally Reich, *More clarity after “Claro”?*, *supra* note 1.

<sup>149</sup> GERAINT G. HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW ¶ 14.7.1 (2d ed. 2005).

<sup>150</sup> *Id.* ¶ 13.9.5.2. (iv).

<sup>151</sup> Norbert Reich, *Zur Wirksamkeit von Schiedsklauseln bei grenzüberschreitenden Börsentermingeschäften*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEUP] 981, ¶ 14.6 (1998) (Ger.).

schemes<sup>152</sup> are preferred because they are binding only on businesses and not on consumers.<sup>153</sup>

The Association of British Travel Agents (ABTA) has initiated a separate arbitration scheme,<sup>154</sup> which is administered by CEDR-solve.<sup>155</sup> The arbitrator's award is issued in writing and provides a summary of the facts, conclusions, and reasons for the decision. The arbitrator's decision is legally binding on both parties and is enforceable directly through the courts. Any party can ask for a review of the arbitrator's decision, on paying a non-reimbursable £ 350 review fee, although there are limited grounds on which this can be challenged.<sup>156</sup>

#### XVI. STATE MONITORED ADR SYSTEMS WITHOUT BINDING ARBITRATION: SCANDINAVIAN COUNTRIES

Most Scandinavian countries have taken a specific approach concerning the handling of consumer disputes, namely, by instituting state complaint boards in which business and consumer associations participate. This makes arbitration an out-of-court instrument of dispute settlement more or less superfluous.

The institution of the Danish consumer complaint boards<sup>157</sup> may serve as a model. Article 8(3) of the Danish *Lov om Forbrugerklagenævnet* of 1974/1988<sup>158</sup> provides for a priority of proceedings before the complaint board—even if the matter is already in arbitration—if the consumer wants to take his complaint before the board. The consumer can take his complaint before the board at any

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<sup>152</sup> An ombudsman scheme is a voluntary ADR system set up by the industry and approved by the government.

<sup>153</sup> Howells & Weatherill, *supra* note 150, ¶ 14.6.

<sup>154</sup> See HODGES ET AL., *supra* note 118, at 328.

<sup>155</sup> *Dispute Resolution Services*, CEDR, <http://www.cedr.com/solve/dispute-resolution-services/> (last visited Dec. 6, 2015).

<sup>156</sup> HODGES ET AL., *supra* note 118, at 331.

<sup>157</sup> Danish consumer complaint boards have been analyzed in detail by Jens M. Scherpe, *Außergerichtliche Streitbeilegung*, in VERBRAUCHERSACHEN (2002); the German translation of the law is at pages 285-289.

<sup>158</sup> Art. 8(3) Lov om Forbrugerklagenævnet (Lovebehandtgoerelse Nr. 282 of 10.5.1988) (Den.).



time during the complaint proceedings; there is no time limit or other formal requirement. In this case, the arbitration proceedings will be staid until the board has handled the matter. This rule implies that arbitration clauses in consumer contracts are not void as such, but also do not preempt proceedings before the complaint board and thus avoid the limited remedies for the consumer against arbitration clauses in the above-mentioned “Einredesituation” under Article II(3) of the New York Convention of 1958 as a defense against an arbitration clause.

A similar situation in Sweden concerning the *Allmänna Reklamationsnämnden* (ARM) has been described in some detail in a study by this author on financial regulation in the E.U.<sup>159</sup> As a result of the procedure, the ARM issues a written proposal for the settlement (*beslut*), which in most cases will be accepted by the parties. If the parties do not agree, they can take the case to court.

The Scandinavian system is said to work well both in the interests of consumers and of business. It avoids lengthy court proceedings and reaches a high rate of successful settlements.

#### XVII. A SEEMINGLY UNKNOWN EXPERIENCE: POLAND

Poland has established—mostly before becoming member of the E.U. in 2004—a detailed arbitration system. Nevertheless, if we consider a recent paper of Polish scholar Kinga Flaga-Gieruszynska, “the awareness of [the arbitration system’s] existence still reaches very few consumers.”<sup>160</sup> There is a general scheme that “imposes” solutions upon traders and consumers alike. This scheme, which is administered by the State Trade Inspection, which has general jurisdiction in all consumer matters except those which are specifically excluded and must be submitted to specialized institutions. These excluded consumer matters are:

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<sup>159</sup> INSTITUTIONELLE FINANZMARKTAUFSICHT UND VERBRAUCHERSCHUTZ (INSTITUTIONAL SUPERVISION OF FINANCIAL MARKETS AND CONSUMER PROTECTION) 165 (Keßler, Micklitz, Reich eds. 2010).

<sup>160</sup> Kinga Flaga-Gieruszynska, *The Model of Consumer Arbitration Courts in Poland*, INT. J. ON CONSUMER L. & PRAC., 28, 39 (2013).

- Permanent arbitration courts with the President of the Office of Electronic Communications concerning claims against telecom and postal operators.
- The Arbitration Court at the Insurance Ombudsman handling disputes concerning insurance contracts and occupational pension schemes.
- Consumer Banking Arbitration at the Polish Banking Association (the Banking Arbitrator) whose decisions are binding on banks, but not on consumers.

There is no obligation for consumers to take their disputes to arbitration, unless a binding agreement has been concluded. This is determined by the general provisions of the Polish Civil Code (Article 385(1), which has implemented the E.U. Directive 93/13 on Unfair Terms in Consumer Contracts.<sup>161</sup> As Flaga-Gieruszynska writes:

Thus, the status of consumer arbitration courts is determined on the one hand by the decision making act of a public authority . . . which is a unique situation with regard to arbitration, and on the other hand—the act of will of the parties, which is the foundation of the creation of arbitration courts (the arbitration clause). Without the latter, it is impossible to speak of the existence of forms of dispute resolution of a voluntary nature.<sup>162</sup>

#### CONCLUSIONS

Arbitration clauses in consumer contracts have been subject to controversy in many jurisdictions. U.S. law has strongly favored arbitration clauses in consumer contracts. Even among law and economics scholars there is no disagreement that “indeed arbitration restricts access to lawsuits and recovery”. This is justified by law and economics scholarship because “it removes the disproportionate benefit (to the ‘sophisticated elite’) and thus eliminates a regressive

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<sup>161</sup> *Id.* at 30.

<sup>162</sup> *Id.* at 31.

cross-subsidy.”<sup>163</sup> It remains however an open question whether this supposed redistributive effect suffices to impose binding arbitration clauses on consumers. In my opinion this is not the case because denial of individual access to justice cannot be justified by overall efficiency arguments.

As the overview of the law on consumer arbitration clauses in some (not all!) E.U. Member countries has shown, the situation is quite different; one may call it even rather “chaotic”. It ranges from a simple prohibition of such clauses (France) to their permission under certain procedural (Germany, Spain, Poland) or substantive limitations (UK), to state monitored ADR systems (Scandinavian countries) which are not formally binding on the consumer but have similar effects in practice.

Directive 2013/11, if implemented by Member State legislation before 9 July 2015 (which does not seem to be the case anyhow!), has not brought about any consistent E.U. practice, unlike the U.S. Federal Arbitration Act. Following a more “access to justice” approach, E.U. law has taken a mixed and to some extent limited approach in including ADR entities that “impose” a solution in its recent ADR Directive 2013/11. There seems to be an indirect encouragement to develop consumer arbitration schemes in Member States as a second route of access to justice. It is too early to evaluate this new and somewhat clandestine policy of the E.U.

This paper therefore has insisted on some additional procedural guarantees should consumer arbitration schemes become more popular among E.U. Member countries, even though Directive 2013/11 already contains some “minimum protection” provisions on “specific acceptance” and applicable law. The basic reference for such additional protection seems to be Article 47 of the E.U. Charter of Fundamental Rights in conjunction with Article 19(1) paragraph 2 of the TEU whereby Member States must “provide remedies sufficient to ensure effective legal protection” of E.U. consumers.<sup>164</sup> At the time of writing, Member States must wait to implement measures

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<sup>163</sup> Omri Ben-Shahar, *Arbitration and Access to Court: Economic Analysis*, in REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 447, 458 (Horst Eidenmüller ed., 2013).

<sup>164</sup> TEU, art. 19(1) ¶ 2.

concerning Directive 2013/11 and to make any final judgments as to their E.U.-law conformity and efficiency. This paper sought to provide some guidelines for this upcoming debate.