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ART. 47 EU CHARTER OF FUNDAMENTAL RIGHTS AND CIVIL COURTS

THE CASE OF ARBITRATION CLAUSES IN CONSUMER CONTRACTS (THE NETHERLANDS VS SPAIN)

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Abstract: The law of the European Union confers subjective rights on citizens, such as those they derive – in their role of consumers – from the Unfair Contract Terms Directive (93/13/EEC). Civil courts play a key role in the enforcement and protection of those rights. Article 47 of the EU Charter of Fundamental Rights (EUCFR) safeguards the right to an effective remedy before a court of law for infringements of substantive EU rights. It may entail a change in perspective towards the autonomy of the Member States as regards remedies, procedures and, in particular, judicial protection under the Directive. It provides civil courts with an instrument for the assessment, (consistent) interpretation and (dis)application of both contractual clauses and procedural rules governing disputes between consumers and their professional counterparties.

The 'proceduralized constitutionalization' of consumer protection can be illustrated by the example of arbitration clauses, which are regulated differently in the EU Member States. In the Netherlands, (online) arbitration in consumer cases has given rise to a debate about the lack of judicial control over commercial 'adjudication'. This will be discussed in light of the case law of the EU Court of Justice concerning unfair terms control and access to court – e.g. Asturcom (C-40/08) and, more recently, Menini (C-75/16) – as well as the groundbreaking decision in Achmea (C-284/16). The aim is to examine the function of Article 47 EUCFR at EU level and at the national level with respect to consumer arbitration and with a focus on the Netherlands and Spain. The Spanish experience can inform Dutch civil courts on how to deal with this issue.

Title: Article 47 EUCFR and civil courts: the case of arbitration clauses in consumer contracts (the Netherlands vs Spain)

Keywords: Directive 93/13/EEC; unfair terms in consumer contracts; civil jurisdiction; Article 47 EUCFR; effective judicial protection; arbitration clauses

***Resumen**: El Derecho de la Unión Europea confiere derechos subjetivos a los ciudadanos, como los que derivan – en su cualidad de consumidores – de la Directiva sobre las cláusulas abusivas (93/13/CEE). Los tribunales del orden civil ejercen un papel clave en la aplicación y protección de estos derechos. El artículo 47 de la Carta de los Derechos Fundamentales de la UE (CDFUE) protege el derecho a la tutela judicial efectiva frente a infracciones del Derecho material de la UE. Este precepto puede suponer un cambio de perspectiva en la que se refiere a la autonomía de los Estados miembros en relación con los remedios, los procedimientos y, en particular, la tutela judicial de los que gozan las consumidores con arreglo a la Directiva. La norma proporciona a los tribunales civiles un instrumento para la evaluación, la interpretación (coherente) y la (des)aplicación tanto de las cláusulas contractuales como de las normas procesales que rigen los litigios entre los consumidores y los profesionales.*

La "constitucionalización procesalizada" de la protección del consumidor puede ilustrarse mediante el ejemplo de las cláusulas de arbitraje, que están reguladas de manera diferente en los Estados miembros de la UE. En los Países Bajos, la resolución privada de conflictos mediante el arbitraje (en línea) en casos de consumo ha dado lugar a un debate sobre la posible mercantilización del sistema, atendida la falta de control judicial de las decisiones del árbitro. Ello se analizará a la luz de la jurisprudencia del Tribunal de Justicia de la UE sobre el control de las cláusulas abusivas y el acceso a los tribunales – por ejemplo, Asturcom (C-40/08) y, más recientemente, Menini (C-75/16) – así como la decisión innovadora en Achmea (C-284/16). El objetivo es examinar la función del artículo 47 CDFUE en la UE y a nivel nacional con respecto al arbitraje de consumo, con particular atención a los Países Bajos y España. La experiencia española puede ilustrar a los tribunales civiles holandeses sobre la manera de tratar este problema.

***Title**: Artículo 47 CDFUE y jurisdicción civil: el asunto de cláusulas de arbitraje y los contratos celebrados con los consumidores (Países Bajos v. España)*

***Palabras clave:** Directiva 93/13/CEE; cláusulas abusivas en los contratos celebrados con los consumidores; jurisdicción civil; Artículo 47 CDFUE; tutela judicial efectiva; cláusulas de arbitraje*

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1. Introduction

In 2008, the Spanish government believed that Spain was among the national legal systems that offered the strongest protection to consumers in respect of (legislative) safeguards against unfair contract terms.[1] At the time, there had been only three Spanish cases before the EU Court of Justice (**CJEU**) on Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contract Terms Directive, or **UCTD**).[2] The Spanish government might have been right from a substantive point of view,[3] but from a procedural perspective it appears to have been mistaken. Over the next ten years (2008-2018), the CJEU held on various occasions that Spanish procedural law did not offer sufficient protection to consumers.[4] One of the first cases in which Spanish procedural rules were questioned in the light of the UCTD was *Asturcom* (2009),[5] which concerned the limited scope for review by civil courts of arbitral awards rendered against consumers. The case demonstrates the tension between alternative dispute resolution (**ADR**; including arbitration), effective judicial protection of consumers under the UCTD and the procedural autonomy of the Member States in this respect. Almost ten year later, Dutch courts are confronted with a similar issue as the one in *Asturcom*, which will be discussed in this paper (see section 2 below). The Spanish experience can inform Dutch civil courts on how to deal with this issue.

The UCTD provides only for minimum harmonization. The Member States must ensure that unfair terms are not binding on consumers and that adequate and effective means exist to prevent the continued use of unfair terms (Articles 6 and 7 UCTD). However, the UCTD does not contain any detailed procedural rules, e.g. as to the enforcement of contractual claims. The Member States have procedural autonomy to regulate the legal remedies and procedures governing actions pertaining to the rights individuals derive from the UCTD.[6] In practice, the applicable rules vary considerably across national legal systems. Thus, consumers enjoy a different level of protection under Spanish law than, for instance, Dutch law.[7] Under Spanish law (as of 2007),

1 Written observations of the Kingdom of Spain, submitted to the CJEU in Case C-40/08 *Asturcom* on 11 August 2008 (*Observaciones del Reino de España en el asunto C-40/08 Asturcom*; not published).

2 Case C-240/98 Océano Grupo Editorial v Murciano Quintero ECLI:EU:C:200:346 (2000); Case C-70/03 Commission v Spain ECLI:EU:C:2004:505 (2004); Case C-168/05 Mostaza Claro v Centro Móvil Milenium ECLI:EU:C:2006:675 (2006).

3 See e.g. Case C-484/08 *Caja de Ahorros v Ausbanc* ECLI:EU:C:2010:309.

4 See e.g. Case C-618/10 *Banco Español de Crédito v Calderón Camino* ECLI:EU:C:2012:349 (2012), Case C-415/11 *Aziz v Catalunyacaixa* ECLI:EU:C:2013:164 (2013); CASE C-169/14 *Sánchez Morcillo v BBVA* ECLI:EU:C:2014:2099 (2014).

5 Case C-40/08 Asturcom Telecomunicaciones v Rogríguez Noguiera ECLI:EU:C:2009:615.

6 See e.g. Case C-473/00 *Cofidis v Fredout* ECLI:EU:2002:705, para 28; Case C-147/16 *Karel de Grote-Hogeschool v Kuijpers* ECLI:EU:C:2018:320, para 33.

7 For the purpose of this paper, only domestic disputes will be covered. As regards the applicable law and jurisdiction in cross-border disputes, see e.g. Case C-191/15 *Verein für Konsumenteninformation v Amazon EU*,

arbitration clauses in consumer contracts concluded before a dispute has arisen are in principle considered to be not binding.[8] The reason for this is that consumers have a weaker position vis-à-vis their professional counterparties (i.e. traders) and should not be forced to waive the rights afforded to them by law; they cannot properly evaluate upfront whether they want to go to arbitration or to court.[9] In the Netherlands, by comparison, arbitration clauses in standard terms and conditions were not generally considered as unfair until 2015, and there is still an 'escape' (as we will see in section 2).

While the Member States can to a certain extent decide whether and under which conditions e.g. arbitration clauses in consumer contracts are allowed,[10] their procedural autonomy is not unlimited. Today, the most preliminary references to the CJEU regarding the UCTD originate from Spain, many of which relate to procedural issues that have come to light in the wake of the financial crisis.[11] In response, the CJEU has developed a body of case law on national remedies and procedures under the UCTD.[12] The 'proceduralization' of the UCTD[13] proves that the harmonization of rights at the EU level and the protection of those rights at the national level are inextricably linked. Indeed, consumer rights are only as effective as their enforcement.[14] There is a connection between substantive and procedural consumer protection. According to the CJEU, there is a real risk that consumers are unaware of their rights or deterred from enforcing them on account of legal costs or other procedural obstacles.[15] Often, consumers are the defendant, which means their legal

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ECLI:EU:C:2016:612 respectively Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37.

8 Articles 57.4 and 90.1 of the *texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios* (**TR-LGDCU**; General Act for the Defence of Consumers and Users).

9 Ley 44/2006, de 29 de diciembre de mejora de la protección de los consumidores y usuarios, Boletín Oficial del Estado (**BOE**) No. 312 of 30 December 2006, 44601, Preamble VII.

10 Article 1(q) of the Annex to the UCTD, which contains an indicative and non-exhaustive list of terms that may be regarded as unfair, refers to terms "excluding 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".

11 See further e.g. Fernando Gómez Pomar and Karolina Lyczkowska, 'Spanish Courts, the European Court and Consumer Law: Some Thoughts on Their Interaction' in Fabrizio Cafaggi and Stephanie Law (eds), *Judicial Cooperation in European Private Law* (Edward Elgar Publishing 2017); Maribel González Pascual, 'Social Rights Protection and Financial Crisis in Europe. The Right to Housing, a Cautionary Tale' (2016) 9 Inter-American and European Human Rights Journal 260; Sara Iglesias Sánchez, 'Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: Aziz v. Catalunyacaixa' (2014) 51 Common Market Law Review 955.

12 See further e.g. Hans-W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771.

13 Federico Della Negra, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: Sánchez Morcillo and Kušionová' (2015) 52 1009, 1010; Iris Benöhr, *EU Consumer Law and Human Rights* (First edition, Oxford University Press 2013) 14.

14 Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 660.

15 See e.g. *Mostaza Claro*, para 28; *Océano*, para 26; *Karel de Grote-Hogeschool*, para 32. See also Mónika Józon, 'Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness' [2017] Journal of European Consumer and Market Law 157, 162.

position will be affected whether they participate in the proceedings or not.[16] This is why effective judicial protection is especially important in the area of EU consumer law and unfair terms control.

This paper aims to explore the impact of Article 47 of the EU Charter of Fundamental Rights (**EUCFR**) – which guarantees the right to an effective remedy before a court of law for infringements of EU rights[17] – on national civil procedure, in the context of the UCTD. Arbitration clauses will be taken as an example, because they reveal the different considerations and potentially conflicting interests at stake. At the level of the parties, there is the interest of the creditor in a swift debt recovery and in having access to efficient procedures, the (substantive) right of the consumer-debtor to be protected against unfair terms as well as the (procedural) right of access to court and other procedural safeguards, e.g. the right to be heard.[18] EU law appears to protect both substantive and procedural rights under the UCTD, read in conjunction with Article 47 EUCFR. At the same time, the CJEU has shown some deference to the Member States in procedural matters, like in *Asturcom* (see section 3 below). Whereas the CJEU decided the case on the basis of the principles of equivalence and effectiveness, Advocate General (**AG**) Trstenjak had referred to Article 47 EUCFR – which entered into force on 1 December 2009, two months after the CJEU's judgment – and arrived at a distinct conclusion.[19] The diverging approaches of the CJEU and the AG will be discussed in this paper.

More recent case law – in particular, *Menini* (2017) and *Achmea* (2018)[20] – indicates that Article 47 EUCFR may entail a change in perspective (see section 4).[21] It reinforces the mandate of courts, which must uphold the subjective rights EU law confers on citizens (in their role of consumers), also in private law adjudication.[22] The CJEU has

16 Case C-147/16 *Karel de Grote-Hogeschool v Kuijpers*, Opinion of AG Sharpston ECLI:EU:C:2017:928, point 32.

17 Article 47 EUCFR reads: "Everyone 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. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

18 See e.g. Case C-472/11 *Banif Plus Bank v Csaba Csipai* ECLI:EU:C:2013:88, para 29.

19 Case C-40/08 *Asturcom Telecomunicaciones v Rodríguez Nogueira*, Opinion of AG Trstenjak ECLI:EU:C:2009:305.

20 Case C-75/16 *Menini and Rampanelli v Banco Popolare Società Cooperative* ECLI:EU:C2017:457; Case C-284/16 *Slovak Republic v Achmea* ECLI:EU:C:2018:158.

21 See also Anna Van Duin, 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC' [2017] Journal of European Consumer and Market Law 190.

22 Hugh Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-National Law', *Revolution and Evolution in Private Law* (Hart Publishing 2018) 327. See also Hans-W Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' in HW Micklitz and B De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 363.

recently confirmed that Article 47 EUCFR is sufficient in itself to confer a right on individuals on which they may rely in disputes between them (i.e. 'horizontal' legal relationships) in a field covered by EU law.[23] Consequently, national civil courts must ensure the effective judicial protection of individuals and guarantee the full effectiveness of Article 47 EUCFR by disapplying (if necessary) any contrary provision of national law. The Dutch experience will be discussed against the background of Spanish law in order to illustrate how, despite disparities between national legal systems, Article 47 EUCFR may operate as an 'EU standard' to remove obstacles and fill gaps in the procedural framework for consumer protection.

2. Example from the Netherlands: e-Court

In civil litigation (and arbitration), there is always a tension between the claimant's right of access to justice and the defendant's rights of the defence, which are both protected by Article 47 EUCFR.[24] Cases falling within the scope of the UCTD are characterized by a contractual imbalance between the parties, accentuated by a procedural inequality which may increase as there are more procedural obstacles or restrictions.[25] Therefore, the procedural position of the consumer matters: is she the claimant or the defendant, and in what type of proceedings? What are the instruments available to her, e.g. how and on what grounds can she challenge an (allegedly unfair) arbitration clause? And when should the court be able to step in, e.g. by refusing to enforce an arbitral award against a consumer? These modalities are primarily determined by national procedural law, which plays a decisive role in the effective judicial protection of consumers under the UCTD.

In Spain, only consumers have access to arbitration to bring their claims, not traders. There is a special *Sistema Arbitral del Consumo* (consumer arbitration system), which is regulated by law.[26] Consumers can choose to go to court or to the *Sistema Arbitral del Consumo*. They can, in principle, not be subjected to arbitration as a defendant.[27] This

[23] Case C-414/16 *Egenberger v Evangelisches Werk* ECLI:EU:C:2018:257, para 78.

[24] See e.g. Case C-327/10 *Hypoteční banka v Lindner* ECLI:EU:C:2011:745, para. 46.

[25] Cf. *Sánchez Morcillo* (2014), paras 22-24 and paras 46-48.

[26] *Real Decreto 636/1993, de 3 de mayo, por el que se regula el sistema arbitral de consumo,* BOE No. 121 of 21 May 1993, 15400; *Real Decreto 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo*, BOE No. 48 of 25 February 2008, 11072. See further M[a] Teresa Álvarez Moreno, 'Resolución Alternativa de Litigios Con Consumidores y Arbitraje de Consumo' in Silvia Díaz Alabart (ed), Manual de Derecho de consumo (Editorial Reus 2016). The submission of disputes to arbitration other than consumer arbitration is considered to be an unfair term, except in the case of arbitration bodies established by statutory provision in respect of specific sectors or circumstances (Article 90.1 TR-LGDCU).

[27] Cf. *Tribunal Constitucional*, decision No. 1/2018 of 11 January 2018, ECLI:ES:TC:2018:1. For further background on the consumer ADR scheme in Spain, see Pablo Cortés, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16 ERA Forum 125, 133ff.

is different in the Netherlands, where ADR is to a large extent self-regulated[28] and arbitration is used as a mechanism to enforce claims *against* consumers as well. This has recently provoked a debate on consumer arbitration via a private foundation called 'e-Court'.[29] E-Court is an online platform that presents itself as an easier, faster and cheaper alternative to the judicial system, with lower fees and a completely digital procedure.[30] As it turned out, e-Court was mostly used by professional parties who brought claims against consumer-debtors on a large scale; through e-Court they were able to quickly obtain arbitral awards granting their claims. However, multiple aspects of e-Court's mode of operation were arguably problematic from the perspective of consumer protection. Most consumers had no idea they had given their 'consent' to arbitration when they signed the contract with the creditor. The time limit for the consumer to submit a defence was very short (approximately 1 week). If no defence was submitted, a standardized decision would be automatically generated, which simply referred to the case file for the claimed amount and other case-specific information. Furthermore, it was doubtful whether unfair terms control (including the arbitration clause) had taken place. Thus, arbitral awards rendered by e-Court were potentially based on invalid arbitration clauses and granted claims could encompass unfair terms regarding e.g. interest and costs. There were also concerns as to e-Court's independence – its business model was based on large numbers of cases brought by the same creditors – and transparency; its decisions were not published and the names of its arbiters undisclosed. In addition, the scope for judicial review of arbitral awards is limited.[31]

In the Netherlands, arbitration clauses are on the 'black list' of unfair standard terms and conditions in consumer contracts since 2015.[32] This means that such clauses are

[28] See also An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. Strand 2: Procedural Protection of Consumers, Report prepared by a Consortium of European universities led by the Pax Planck Institute Luxembourg for Procedural Law as commissioned by the European Commission (JUST/2014/RCON/PR/CIVI/0082), published 26 January 2018 (available at http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503), 82.

[29] For the following paragraph, the main source has been an article published (in Dutch) by investigative journalists Karlijn Kuijpers, Thomans Muntz and Tim Staal, 'Vonnis te koop', (2018) 3 De Groene Amsterdammer, 28, available at https://www.groene.nl/artikel/vonnis-te-koop. For more background (in Dutch), see Anna van Duin, 'E-Court en 'robotrechtspraak': efficiëntie ten koste van rechtsbescherming', (2018) Sdu-blog https://www.sdu.nl/blog/e-court-en-robotrechtspraak-efficientie-ten-koste-van-rechtsbescherming.html.

[30] See www.e-court.nl (last consulted on 25 May 2018).

[31] Articles 1063.3 and 1065.1 *Wetboek van Burgerlijke Rechtsvordering* (**Rv**; Code of Civil Procedure).

[32] Article 6:236(n) *Burgerlijk Wetboek* (**BW**; Civil Code), which reads, in English translation (http://www.dutchcivillaw.com/civilcodebook066.htm): "The following stipulations in the applicable standard terms and conditions are deemed to be unreasonably burdensome for [consumers]: (…) **n**. a stipulation which provides for the settlement of a dispute other than by a court with jurisdiction pursuant to law, unless it still allows the [consumer] to choose for a settlement of the dispute by the court with jurisdiction pursuant to law and this choice can be made within a period of at least one month after the [trader] has invoked the stipulation in writing."

deemed as unfair, unless consumers are given a period of one month from the moment an arbitration clause is invoked against them to decide whether they prefer to go to court instead. The main reason for 'blacklisting' arbitration clauses is that otherwise, consumers could be deprived – without being aware of it or against their will – of the protection of the courts assigned to them by law.[33] The 'escape' of a one-month period distinguishes the Dutch provision from its Spanish counterpart: if the consumer does not object within this period, the arbitration clause is, in principle, valid. In the case of e-Court, it appeared that this one-month period was not always taken into account. And even when the consumer had objected to arbitration, arbitral awards were still rendered sometimes.[34] It was also questionable whether consumers were sufficiently informed of the difference between arbitration and ordinary court proceedings in the first place, so they could make a well-considered choice.[35]

Article 47 EUCFR may have played an indirect role in the legislative change of 2015. The Dutch legislator referred to a case in which a Dutch court had held that arbitration clauses in consumer contracts were unfair because they run counter to Article 47 EUCFR.[36] Arbitration may have disadvantages for consumers compared to courts; the proceedings are not governed by the same safeguards. The Dutch Supreme Court nevertheless quashed the judgment, because the individual circumstances of the case should have been taken into account instead of an 'objective' argumentation that was applicable to all arbitration clauses.[37] Yet, the case demonstrated that arbitration clauses in consumer contracts were controversial. In 2017, another Dutch court put the emphasis on a potential lack of consent rather than procedural safeguards, but in the end it found that in the circumstances of the case the arbitration clause at issue was not unfair.[38] This raises the question how Article 47 EUCFR relates to consumer arbitration (before and after 2015) in the context of unfair terms control: does it impose certain procedural guarantees and/or does it (also) entail stricter requirements as to consent (e.g. a waiver of the right of access to court must be interpreted restrictively[39])? The answer seems to be that it can do both, although procedural rights are not absolute (see further section 4 below) and 'consent' is appraised slightly differently in Dutch law than in Spanish law. A follow-up question would be: what if it is doubtful whether the court has the power to examine whether these requirements have been observed? Can Article 47 EUCFR be used as a basis to provide an effective judicial remedy (see further section 3 below)?

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33 *Kamerstukken* (Parliamentary Papers) II, 2012/2013, 33 611, nr. 3, p. 7.

34 See e.g. *Rechtbank Amsterdam* 30 January 2018, ECLI:NL:RBAMS:2018:419.

35 Cf. Case C-342/13 *Sebestyén v OTP Bank* ECLI:EU:C:2014:1857, para 36.

36 *Gerechtshof Leeuwarden* 5 July 2011, ECLI:NL:GHLEE:2011:BR2500 (*Van Marrum/Wolff*).

37 *Hoge Raad* (Supreme Court), judgment of 21 September 2012, ECLI:NL:2012:BW6135.

38 *Gerechtshof Arnhem-Leeuwarden* 11 July 2017, ECLI:NL:GHARL:2017:5961 (*Pharma Slovakia C.V.*)

39 See e.g. *Rechtbank Almelo* 7 October 2011, ECLI:NL:RBALM:2011:BT7088. Cf. MW Knigge and PLF Ribbers, 'Arbitrage, Afstand van Recht En Artikel 6 EVRM' (2017) 20 Tijdschrift voor Arbitrage 35.

There are three situations in which a civil court may have to assess the (un)fairness or (in)validity of an arbitration clause: (i) the defendant invokes the clause to argue that the court does not have jurisdiction to hear the claim, (ii) an action for annulment of an arbitral award is brought, or (iii) the court is requested to grant leave for the enforcement of an arbitral award. Both Dutch cases referred to in this section concerned the first situation, which is in itself not problematic from the perspective of Article 47 EUCFR because it involves judicial control *ex ante*. In the case of e-Court, it is mostly the third situation, i.e. after the arbitral award has been rendered, where there is only limited space for judicial control. If no action for annulment is brought within three months, the award becomes final and its enforcement can only be refused when the arbitral proceedings or the award itself are *prima facie* contrary to public policy.[40] This could, for instance, be the case when the claimed amount is not specified in the award, so debtors do not know exactly how much they have to pay.[41] It could also be said that this is the case when the above-mentioned one-month period has not been observed and/or the right to be heard has been violated, e.g. the consumer has not had the opportunity to properly prepare a defence; 1 week is exceptionally short.[42] However, it is unclear how the court is supposed to determine this: it normally receives only the arbitral award that is to be enforced and does not carry out an elaborate examination. Leave for enforcement is usually granted *ex parte*, i.e. without hearing the other party (the consumer). This means that the court will not have information about irregularities in the course of the proceedings, if any. Does Article 47 EUCFR, read in conjunction with the UCTD, require more of national courts in this respect?

3. *Asturcom*: guidance from EU law?

Asturcom concerned the enforcement of an arbitral award that was based on a presumably unfair arbitration clause in a contract between a Spanish mobile telephone company and a consumer. The court that was asked to enforce the award against the consumer-debtor observed in its preliminary reference that the clause at issue caused a significant imbalance between the parties and impaired the consumer's right of access to court and rights of the defence.[43] The clause had been drafted by the arbitration institute itself, [44] which cast doubt as to its impartiality and independence. Moreover, the seat of the arbitral tribunal was not indicated in the contract; it was located at a considerable distance from the consumer's place of residence and the

[40] Article 1063.2 Rv.
[41] *Rechtbank Amsterdam* 27 March 2017, ECLI:NL:RBAMS:2017:2427.
[42] Cf. Case C-176/17 *Profi Credit Polska v Warwzosek*, Opinion of AG Kokott ECLI:EU:C:2018:293, point 79.
[43] *Juzgado de Primera Instancia No. 4 de Bilbao*, order No. 1147/07 of 4 December 2007 (not published).
[44] In this case, the Asociación Europea de Arbitraje de Derecho y Equidad (AEADE).

costs almost exceeded the claimed amount. The arbitral award was rendered in default of appearance of the consumer, who did not bring an action for annulment and did not oppose the enforcement either. Thus, the award had become final, with *res judicata* effect.[45] In Spain, arbitral awards enjoy the same status as judicial decisions for the purpose of enforcement; the scope of judicial review is restricted to a formalities check.[46] Still, some Spanish courts considered it possible to refuse to enforce the arbitral award when it was based on an unfair arbitration clause within the meaning of the UCTD; others assessed whether the award itself was contrary to public policy, e.g. because of a lack of impartiality of the arbitral tribunal.[47] These were judge-made solutions with no express statutory basis. There were also courts that found the unfairness of an arbitration clause could only be established at the request of the consumer in (a) an action for annulment or (b) opposition against enforcement; *ex officio* control would go against legal certainty and the principle of *res judicata*.[48] The referring court in *Asturcom* seems to have questioned the latter approach (of its own Court of Appeal). The Spanish legislator did not clear the doubt until 2015, when the possibility of *ex officio* control of unfair terms was introduced at the enforcement stage, with explicit reference to *Asturcom*.[49]

In *Asturcom*, the CJEU held that when a national court is asked to enforce a final arbitral award, it must only assess *ex officio* whether the arbitration clause is unfair in the light of the UCTD if national rules of procedure require such an assessment under *domestic rules of public policy*,[50] and where the court has available to it the legal and factual elements necessary for that task.[51] In the Netherlands, an invalid arbitration agreement (e.g. because of an unfair arbitration clause and/or due to a lack of consent) is, strictly speaking, a different ground than the arbitral proceedings or the award being contrary to public policy.[52] In Spain, a similar distinction – between public policy and other grounds – applies in actions for annulment of arbitral awards, but *not at the enforcement stage*.[53] Thus, the principle of equivalence did not necessarily help

45 Article 43 *Ley de Arbitraje* (**LA**; Arbitration Act).

46 Article 517.2.2° *Ley de Enjuiciamiento Civil* (**LEC**; Code of Civil Procedure) respectively Articles 551 and 552 LEC; cf. Articles 556 and 559 LEC.

47 María García-Valdecasas Dorrego, *Dialogue between the Spanish Courts and the European Court of Justice Regarding the Judicial Protection of Consumers under Directive 93/13/EEC* (Fundación Registral 2018) 47.

48 See e.g. *Audiencia Provincial de Bilbao*, order No. 396/08 of 6 June 2008 (not published).

49 *Ley 42/2015, de 5 octubre, de reforma de la Ley 1/2000, de 7 enero, de Enjuiciamiento Civil,* BOE No. 239, 6 October 2015, 90240 (Disposición transitoria segunda: Procesos monitorios y ejecución de laudos arbitrales). See further Arroyo Amayuelas (n 12) 79–80.

50 Article 6 UCTD must be regarded as a provision of equal standing to domestic rules of public policy: see e.g. Case C-243/08 *Pannon v Sustikné Győrfi* ECLI:EU:C:2009:350, para 32; *Asturcom*, paras 51-52; Case C-421/14 *Banco Primus v Gutiérrez García* ECLI:EU:C:2017:60, para 42.

51 *Asturcom*, paras 53 and 59.

52 See further Alain Ancery, *Ambtshalve Toepassing van EU-Recht* (Kluwer 2012) 192.

53 Article 41.1 LA.

the consumer-debtor here.[54] According to the CJEU, the need to comply with the principle of effectiveness cannot be stretched so far as to mean that the national court should make up fully for "total inertia" on the part of the consumer, who had been notified of both the arbitration proceedings and the arbitral award of which the enforcement was sought. A time-limit of two months to bring an action for annulment did not make it "virtually impossible or excessively difficult" for the consumer to exercise her rights.[55] It is compatible with EU law to establish reasonable time-limits in the interest of legal certainty.[56] National courts are not obliged to refrain from applying procedural rules conferring finality (*res judicata* effect) on a judicial decision or arbitral award), even if it is not in conformity with EU law.[57]

By contrast, AG Trstenjak had argued that – in light of the aim of the UCTD to protect consumers and the obligation of the Member States to effectively guarantee the rights granted to individuals by EU law – the national court must always have the power of *ex officio* control.[58] She pointed out that the consumer could not be expected to take part in invalid arbitration proceedings based on an unfair arbitration clause, in order to have the clause annulled. In this respect, the AG referred to Article 47 EUCFR and the right to be heard.[59] This right must be guaranteed in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, including arbitral proceedings.[60] The AG also questioned whether arbitrators can be regarded as independent and neutral when the arbitration clause has been drafted by the same institute that is entrusted with the arbitration proceedings.[61] Independence presupposes that the tribunal is protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.[62]

The Opinion of AG Trstenjak shows how *Asturcom* could have had a different outcome if it had been framed as an issue of effective judicial protection, in particular the rights of the defence. The question is whether the consumer, as a defendant, can be expected to bring annulment proceedings against an arbitral award rendered by e.g. e-

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54 The referring court in *Asturcom* ultimately gave an enforcement order (*Juzgado de Primera Instancia No. 4 de Bilbao*, order of 26 October 2009; not published). See also Chantal Mak, 'Judgment of the Court (First Chamber) of 6 October 2009, Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, Case C-40/08' [2010] European Review of Contract Law 437, 447.

55 *Asturcom*, paras 46-47.

56 *Asturcom*, para 41.

57 See e.g. Case C-126/97 *Eco Swiss v Benetton International* ECLI:EU:C:1999:269, para 48.

58 Opinion AG Trstenjak, points 58-59.

59 Ibid, points 64 and 61 respectively.

60 Cf. Case C-277/11 *M.M. v Ministry for Justice, Equality and Law Reform* ECLI:EU:C:2012:744 para. 82, C-300/11 Z*.Z. v Secretary of State for the Home Department* ECLI:EU:C:2013:363 paras. 55 and 57.

61 Opinion AG Trstenjak, point 66.

62 C-64/16 *Associaçao Sindical dos Juízes Portugueses v Tribunal de* Contas ECLI:EU:C:2018:117, para 44, referring to inter alia *Margarit Panicello*, para 37.

Court at all.[63] There are other reasons than inertia that may cause consumers "to forego any legal remedy or defence".[64] Various factors can deter them from pursuing their claims or defending their rights, e.g. a lack of information, financial risks and/or low amounts in dispute.[65] When consumers are confronted with an arbitral award, albeit based on an unfair arbitration clause, they may be pressured into paying instead of challenging the award in court.[66] It could be argued that, if there is no (or only limited) judicial control, traders can actually deprive consumers of the protection intended by the UCTD, read in conjunction with Article 47 EUCFR, simply by initiating arbitration proceedings.[67]

4. A closer look at Article 47 EUCFR

Since 2009, Article 47 EUCFR is a mandatory requirement that is binding on national (civil) courts when they decide cases under the UCTD.[68] It has been referred to in cases concerning e.g. order for payment procedures[69] and the (extrajudicial) enforcement of charges and mortgages.[70] What these cases have in common with *Asturcom*, is that they raise the question how the effective judicial protection of consumers can be ensured if the courts are side-lined. National (civil) courts also play a key role in the enforcement and protection of substantive (EU) rights. While there may be other ways to achieve a high level of consumer protection,[71] courts may be viewed as a last resort to provide a remedy against violations of those rights. At the same time, the debate about e-Court raises questions as to the deficiencies of the judicial system – e.g. costs and length of the proceedings – that makes parties resort to ADR mechanisms.

The right of access to court is not absolute. It may be restricted, provided that the restrictions pursue objectives of general interest and do not involve a disproportionate interference with the very essence of the right (cf. Article 52(1) EUCFR).[72] The test

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63 Hanna Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom' [2010] European Review of Private Law 847, 862.

64 Case C-137/08 *Pénzügyi Lízing v Schneider*, para 54; *Océano*, para 22.

65 Marco Loos, 'Access to Justice in Consumer Law' (2015) 36 Recht der Werkelijkheid 113.

66 Cf. Case C-503/15 *Margarit Panicello*, Opinion of AG Kokott ECLI:EU:C:2017:126, point 171.

67 See, with respect to mortgage enforcement proceedings, *Aziz*, para 62; Joined Cases C-537/12 and C-116/13 *Banco Popular Español v Rivas Quichimbo* ECLI:EU:C::2013:759, para 60; *Sánchez Morcillo*, para 28; C-32/14 *ERSTE Bank Hungary v Sugár*, para 45.

68 *Banif Plus Bank*, para 29; *Sánchez Morcillo*, para 35; Case C-34/13 *Kušionová v SMART Capital* ECLI:EU:C:2014:2189, para 47.

69 Case C-49/14 *Finanmadrid EFC SA v Albán Zambrano* ECLI:EU:C:2016:98; Case C-503/15 *Margarit Panicello v Hernández Martínez* ECLI:EU:C:2017:126.

70 *Kušionová*; *Sánchez Morcillo*.

71 In this respect, there is a difference between effective *legal* protection (cf. Article 19 of the Treaty on European Union) and effective *judicial* protection, and between access to *justice* and access to *court*.

72 See further Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen and others (eds), *Fundamental rights in international and European law: public and private law perspectives* (TMC Asser Press 2015) 151.

under Article 47 EUCFR is pertinent to the *individual right* to actual 'judicial control', rather than the limits of Member State procedural autonomy under the principles of equivalence and effectiveness.[73] In *Alassini*, which concerned four civil suits against Italian telephone service providers, the CJEU balanced the right of access to court (Article 47 ECUFR) against objectives of general interest, i.e. facilitating the quicker and less expensive settlement of disputes and lightening the burden on the court system.[74] The CJEU adopted a similar reasoning in another Italian case: *Menini* (2017). The Consumer ADR Directive[75] does not preclude mediation as a mandatory preliminary step, as long as it does not prevent the parties from exercising their right of access to the judicial system. The CJEU based this conclusion on the principle of effective judicial protection – with reference to *Alassini*[76] – and the Directive itself,[77] which explicitly refers to Article 47 EUCFR.[78]

Alassini and *Menini* show that ADR can strengthen the effectiveness of consumer protection, where it offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders.[79] This may justify a limitation of the rights laid down in Article 47 EUCFR. In this respect, there is a difference between mediation and arbitration; the latter has a more adjudicative function, to the exclusion of the court's jurisdiction.[80] The Spanish *Tribunal Constitucional* (Constitutional Court) has recognized that it is contrary to the right to effective judicial protection to prescribe arbitration as the default route, because the essence of arbitration is the free will and autonomy of the parties.[81] As regards arbitration clauses in consumer contracts, it is dubious whether this 'free will' can be presupposed. In the context of the UCTD,

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73 Cf. Case C-61/14 *Orrizonte Salute v Ministero della Giustizia*, Opinion of AG Jääskinen ECLI:EU:C:2015:307, point 37.

74 Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini v Telecom Italia SpA* ECLI:EU:C:2010:146, paras 63-64.

75 Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

76 *Menini*, paras 55 and 61.

77 Article 1 reads: "The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. This Directive is without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."

78 Recital 45 reads: "The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising their right of access to the judicial system. (…)"

79 Consumer ADR Directive, recital 5.

80 Schebesta (n 57) 870. See also Andrea Fejős and Chris Willett, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 24 European Review of Private Law 33; Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 European Journal of International Law 607.

81 *Tribunal Constitutional*, decision No. 185/1987 of 18 November 1987, ECLI:ES:TC:1987:185; decision No. 174/1995 of 23 November 1995, ECLI:ES:TC:1995:174; decision No. 352/2006 of 14 December 2006, ECLI:ES:TC:2006:352.

therefore, it appears to be more difficult to justify a restriction of the consumer's right to effective judicial protection.

In *Asturcom*, the CJEU did not consider if and when consumer arbitration might constitute an unjustified infringement of Article 47 EUCFR. It has been observed that the CJEU's hesitation to interfere in national procedural law and arbitration seems to overshadow its pursuit of a high level of consumer protection, perhaps due to the politically sensitive nature.[82] In *Slovak Republic v Achmea* (2018), a (non-consumer) case concerning arbitration under a bilateral investment treaty, the CJEU was bolder. It held that insofar as an arbitral tribunal that is not a court or tribunal of a Member State and thus not part of the judicial system may be called on to interpret or to apply EU law, its awards must be subject to judicial review (in order to ensure that questions of EU law which the tribunal may have to address can be submitted to the CJEU for a preliminary ruling).[83] The CJEU recalled that in relation to commercial arbitration, the requirements of efficient arbitration proceedings may justify the judicial review of arbitral awards being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review.[84] The CJEU does not clarify the relation between "fundamental provisions of EU law" and "public policy" in the context of the recognition and enforcement of arbitral awards. On the one hand, it could be argued that fundamental rights, such as Article 47 EUCFR, are part of (or equivalent to) public policy within the EU.[85] On the other hand, Article 47 EUCFR could also be seen as an additional requirement that does not 'override' (domestic) public policy, but creates space for more judicial control, at least in the context of the UCTD.[86] For the purposes of this paper, a parallel could be drawn with *Achmea* to the extent that arbitration clauses in consumer contracts do not always originate in the freely expressed wishes of both parties and remove disputes which may concern the application or interpretation of EU law from the jurisdiction of the courts.[87] This warrants a more extensive judicial review of arbitral awards in consumer cases, in any case a check of the (in)validity of the underlying arbitration clause: if it is 'blacklisted', it should not be enforced.

82 Mak (n 49) 438, 443; Schebesta (n 57) 871.

83 *Achmea*, paras 42 and 50.

84 *Achmea*, para 54, referring to *Eco Swiss*, paras 35,36 and 40 and *Mostaza Claro*, paras 34-39.

85 See e.g. Vicente Pérez Daudí, *La Protección Procesal Del Consumidor y El Orden Público Comunitario* (Atelier 2018) 134.

86 The recognition and enforcement of (domestic) arbitral awards against consumers cannot be put on a par with the recognition and enforcement of foreign judgments, where using 'fair trial' as a European yardstick may create problems: see Monique Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (TMC Asser Press 2017) 292.

87 *Achmea*, para 55.

5. Conclusion

The example of e-Court in the Netherlands illustrates that ADR can undermine the effective judicial protection of consumers, which goes beyond *ex officio* control of unfair terms and also extends to essential procedural preconditions, e.g. the right to be heard. In this respect, Article 47 EUCFR may set a higher threshold than the principles of equivalence and effectiveness (cf. *Asturcom*). The mere fact that an arbitral award has obtained *res judicata* effect should not make it practically immune from judicial review.[88] Of course, this does not mean that the trader's rights (e.g. to repayment of a debt) are entirely disregarded. There is no one-on-one relationship between an improvement of the consumer's procedural protection and a deterioration of the trader's position from a substantive point of view.[89] On the contrary, traders still have access to the court system as claimants and in the Netherlands also to arbitration, as long as certain (procedural) requirements are observed. If this is not the case or cannot be determined, then it is defensible that the court should refuse to enforce the arbitral award, even if national procedural law does not provide an express statutory basis for that. It remains to be seen how the Dutch judiciary will deal with arbitral awards rendered by e-Court; no requests for enforcement have been filed lately.

There are still considerable disparities between national legal systems in terms of substantive and procedural modalities, as a comparison between the Netherlands and Spain demonstrates. Article 47 EUCFR is subject to interpretation; it leaves choices to be made with regard to the measures that can be taken.[90] Securing effective judicial protection should be done first at the legislative level, but the practical implementation as well as a correction of the legislature's errors or omissions takes place at the level of the judiciary.[91] As the example of e-Court shows, the existence of 'protective' legislation does not guarantee its observance in practice. It is submitted that Article 47 ECUFR could help to fill a gap between (EU) rights and (national) remedies and procedures for the enforcement and protection of those rights.[92]

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[88] Cf. Opinion AG Trstenjak in *Asturcom*, point 75; *Finanmadrid*, para 51.

[89] Folkert Wilman, 'The Vigilance of Individuals: How, When and Why the EU Legislates to Facilitate the Private Enforcement of EU Law before National Courts' (Leiden University 2014) 496.

[90] Cf. Malu Beijer, 'Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union: Exploring the Possibilities of a Positive Obligations Doctrine' (2015) 8 Review of European administrative law 127, 145.

[91] Cf. Nina Półtorak, *European Union Rights in National Courts* (Wolters Kluwer 2015) 150; Fabrizio Cafaggi and Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 European Review of Private Law 575, 580.

[92] Cf. Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014) 99. About a 'civil justice gap' in respect of consumer rights: Benöhr (n 13) 177; Stefan Wrbka, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015) 33. See also European Commission, *Study for the Fitness Check of EU consumer and*

It provides civil courts with an instrument for the assessment, (consistent) interpretation and (dis)application of both contractual clauses and procedural rules, as long as the case falls within the scope of EU law (Article 51(2) EUCFR). As such, the 'proceduralized constitutionalization'[93] of consumer protection may entail a change in perspective, from deference to national law and domestic public policy to an 'EU standard' that empowers national (civil) courts in their capacity of 'decentralized' EU-judges.

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marketing Law – Final report Part 1: Main report, 29 May 2017 (**REFIT Main report**; available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332), 234; Commission Proposal for a Directive amending Council Directive 93/13/EEC (…) as regards better enforcement and modernization of EU consumer protection riles (COM(2018) 185 final), 11 April 2018, 10.

93 Irina Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing) 172.