Justice for both

Effective judicial protection under Article 47 of the EU Charter of Fundamental Rights and the Unfair Contract Terms Directive

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5. ARTICLE 47 IN UNFAIR TERMS CASES IN THE NETHERLANDS

Chapter outline
This chapter examines the role of Article 47 of the Charter in Dutch unfair terms cases. The number of references to Article 47 by civil courts in the Netherlands is low compared to Spain. This does not mean that effective judicial protection is not an issue. The CJEU's case law on the UCTD has given rise to various procedural questions, in particular as to the implementation of the *ex officio* doctrine. This chapter starts with an overview of these questions, as well as possible explanations for the low number of references to Article 47 by Dutch civil courts (section 5.1). It then proceeds with an analysis of the few unfair terms cases where an explicit reference to Article 47 was made (section 5.2). These reveal a signalling and a rhetorical function of Article 47: it shows the court's awareness of the fundamental rights at stake and has persuasive authority, especially in respect of norms with a protective purpose. Several cases concern the level and scope of judicial protection in unfair terms cases without mentioning Article 47, but giving a broad interpretation of available remedies (section 5.3).

Furthermore, a parallel can be drawn between cases on the role of courts of appeal – inter alia, *Asbeek Brusse*, until recently the only Dutch preliminary reference on the UCTD – and *Sánchez Morcillo,* one of the key judgments on Article 47 read in conjunction with the UCTD (section 5.4). Finally, the impact of Article 47 of the Charter via *Banif Plus Bank* and *Asbeek Brusse* in respect of the right to be heard is discussed (section 5.5). Here, the other side of Article 47 – where it is invoked for the protection of traders – manifests itself as well.

5.1 BACKGROUND: A LIMITED ROLE OF ARTICLE 47 IN DUTCH UNFAIR TERMS CASES

5.1.1 Impact of the UCTD on Dutch civil procedure

Consumer protection is considered to be a socio-economic component of Dutch private law, which mostly finds its expression in substantive rules (of contract law). It has been linked to the notion of compensation for inequality between the parties ("*ongelijkheidscompensatie*"),[1010] which in

[1010] Jac Rinkes, 'Ontwikkelingen in het consumentenrecht' [2009] Contracteren 56, 57; Ruth de Bock, *Tussen waarheid en onzekerheid: Over het vaststellen van feiten in de civiele procedure* (Kluwer 2011) 124; Jan Biemans and Alex Geert Castermans, *Barmhartigheid*

Dutch legal literature is often referred to in the areas of labour law and administrative (procedural) law. The 1992 Civil Code (*Burgerlijk Wetboek*; **BW**) introduced an open norm containing a test for standard contract terms and conditions (Article 6:233 BW, which refers in sub a to terms that are "unreasonably burdensome or "excessively onerous"). The debate has largely concentrated on the interpretation and application of this open norm in light of the UCTD. An unfair term can be delared null and void (unenforceable or non-binding); the Supreme Court of the Netherlands (***Hoge Raad***) has confirmed it may also be annulled by the court of its own motion.[1011] Furthermore, there is a 'black list' of specific clauses in consumer contracts that are deemed to be unfair (Article 6:236 BW) and a 'grey list' of clauses that are presumed to be unfair unless proven otherwise (Article 6:237 BW).

The Dutch legislator has been criticised for half-hearted (indecisive) drafting when implementing EU consumer law, leaving it entirely up to the courts to interpret and apply the law.[1012] The CJEU's case law has not been codified in the Netherlands; no amendments have been made to the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*; **Rv**) so far. It is up to the judiciary to implement the *ex officio* doctrine in practice, but until 2013 the *Hoge Raad* did not provide much guidance either.[1013] In 2010, a report was published by a special working group of the National Consultation Committee on Civil Law of the District and Subdistrict Courts (*Landelijk overleg vakinhoud civiel en kanton van de rechtbanken*; **LOVCK**) containing detailed guidelines for the *ex officio*

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in het burgerlijk recht. Bespiegelingen over de grenzen aan kredietverlening en een bijdrage aan het behoud van bestaanszekerheid (Uitgeverij Paris 2017) 21, 90.

1011 *Hoge Raad*, judgment of 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014, 274 m.nt. H.B. Krans (***Heesakkers/Voets***), para 3.7.3. In his case note, Krans refers to a special 'European' application of the ground for annulment in Article 6:233 BW.

1012 Roland de Moor, 'Procesrechtelijke beschouwingen van de tweede gratis-mobieltjes-uitspraak van de Hoge Raad' [2016] Tijdschrift voor Consumentenrecht en handelspraktijken 232, 232–233. See also Charlotte Pavillon, *Open normen in het Europees consumentenrecht. De oneerlijkheidsnorm in vergelijkend perspectief* (2011) 2–3. In Case C-144/99 *Commission of the European Communities v Kingdom of the Netherlands*, the CJEU found that the UCTD had not been fully transposed into Dutch law. A settled (judicial) interpretation of legislative provisions that are not precise and clear enough is not sufficient to attain the results envisaged by the Directive (paras 20-21).

1013 See e.g. Pavillon (n 1012) 135. There are no specific provisions for consumers in the Dutch Code of Civil Procedure, with a few exceptions concerning competence (Article 101 Rv) and forum choice (Article 108 Rv).

application of EU consumer law, in particular the UCTD, by lower courts. Second and third versions of the LOVCK Report were published in 2014 and 2018 respectively.[1014] The Report intended to formulate a common judicial position, but it has not been endorsed by appellate courts and the *Hoge Raad* is silent about its status. Nevertheless, the Report is said to have contributed to a "culture shift" in the adjudication of consumer cases.[1015] It contains recommendations to all (lower) courts dealing with consumer cases, with extensive references to CJEU case law on the UCTD. Whilst the Report thus facilitates judicial protection in unfair terms cases, it does not expressly mention the Charter.

The reception of the *ex officio* doctrine in the Netherlands has already been elaborately discussed by other scholars.[1016] For the purposes of this study, only the key judgments on the role of Dutch civil courts in unfair terms cases will be mentioned.

In *Heesakkers/Voets* (2013), a leading judgment following the CJEU's judgment in *Asbeek Brusse*,[1017] the *Hoge Raad* provided guidance for the consistent interpretation of Dutch law with the CJEU's case law on the UCTD. The judgment predates most CJEU references to Article 47 of the Charter, but, like the LOVCK Report, it addresses the way(s) Dutch civil courts must ensure effective judicial protection under the UCTD. The case revolved around three main procedural issues: the scope for *ex officio* control of unfair terms in (i) appeal and (ii) default proceedings, where the role of the court is usually more limited, as well as (iii) the powers of the court to gather information. Voets, who was contracted by

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1014 Full title: *Ambtshalve toetsing III. Herzien rapport van de LOVCK&T redactieraad*, May 2018. The report will hereinafter be referred to as **2018 LOVCK Report**. It can be found (in Dutch) at https://www.rechtspraak.nl/SiteCollectionDocuments/rapport-at-III-31-juli-2018.pdf.

1015 Opinion of AG Valk of 12 July 2019, ECLI:NL:PHR:2019:769 (***StAR***), point 3.16. See also Alain Ancery and Bart Krans, 'Consumer Protection and EU-Driven Judicial Activism in the Netherlands' in Anna Nylund and Magne Strandberg (eds), *Civil Procedure and Harmonisation of Law* (Intersentia 2019) 126, 136–137.

1016 See e.g. Ancery (n 31); Arthur Hartkamp, 'Ex Officio Application in Case of Unenforceable Contracts or Contract Clauses: EU Law and National Laws Confronted' in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law, Essays in Honour of Hough Beale* (Hart Publishing 2014); Ewoud Hondius, 'Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law' [2016] European Review of Private Law 457.

1017 Case C-488/11 *Asbeek Brusse*; see further subsection 5.5.1 below.

Heesakkers to carry out construction works in his home, brought a claim for payment of the outstanding amount, plus contractual interest. The claim was awarded both in first instance and in appeal. Before the *Hoge Raad*, Heesakkers no longer contested Voets' main claim, but he complained that the Court of Appeal (*Gerechtshof*) had granted contractual interest without performing unfair terms control *ex officio* – the interest clause had not been challenged in appeal. In short, the *Hoge Raad* held that the duty of *ex officio* control also applies in appeal proceedings; it requires an examination of law which is equivalent to national rules of public policy.[1018] The same applies in default proceedings. If the necessary factual and legal information is available for the court to suspect that a clause falls within the scope of the UCTD and it is unfair, the court must investigate this, even if it has not been brought up by the parties themselves. The court must take the measures of inquiry that are needed to ensure the full effectiveness of the UCTD.[1019] The court must also observe the principle of *audi alteram partem* and allow the parties to further specify or amend their position.[1020] If the court finds a term to be unfair, it must annul the term *ex officio*, unless the consumer opposes the term's inapplicability.

The *ex officio* doctrine has an impact on other procedural issues, such as evidence and the burden of proof. In 2012, the *Hoge Raad* held that in principle, it is the consumer who must invoke and, if necessary, prove a term's unfairness.[1021] According to the LOVCK Report, this is irreconcilable with the duty of *ex officio* control in the CJEU's case law (and elaborated in *Heesakkers/Voets*).[1022] If a term is on the black list of unfair standard terms and conditions in consumer contracts, its use cannot be justified under any circumstances.[1023] If a term is on the grey

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1018 *Hoge Raad*, judgment of 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakkers/Voets*), paras 3.6.3, 3.9.2 and 3.6.1 respectively. Both in appeal and in default proceedings, Dutch civil courts must examine compliance with rules of public policy: Madeleine van Rossum and Emma van der Minne, 'De (on)mogelijkheid van ambtshalve toetsing van het Unierecht in hoger beroep' [2017] Tijdschrift voor de Procespraktijk 98, 101.

1019 Above-cited judgment of *Hoge Raad*, para 3.9.1. See also *Hoge Raad* 10 July 2015, ECLI:NL:HR:2015:1866, para 3.7.

1020 Above-cited judgment of *Hoge Raad*, para 3.9.2. See further section 5.5 below.

1021 *Hoge Raad* 21 September 2012, ECLI:NL:HR:2012:BW6135 (***Van Marrum/Wolff***), para 2.4, further discussed in subsection 5.2.1 below.

1022 2018 LOVCK Report, p. 77.

1023 Marco Loos, *Algemene voorwaarden* (Boom Juridische Uitgevers 2018) 169.

list, it is presumed to be unfair, unless proven otherwise by the trader. If the term is neither on the black nor on the grey list, the court can still request the trader to explain why it is not unfair in the circumstances of the case – also if the consumer has not invoked the term's unfairness. The court can ask traders to submit their general terms and conditions if they have not yet done so; if a trader refuses, the court can presume those terms to be unfair.[1024]

After *Heesakkers/Voets*, *ex officio* control has remained contentious, in particular in the course of judicial review of arbitral awards and appellate proceedings.[1025] The more active role required from courts under EU consumer law has caused tension with, in particular, the notion of party autonomy. There is also tension with the need for efficiency, from the perspective of both traders/creditors who wish to quickly obtain an enforceable title as well as costs of the administration of justice.[1026] That being said, the need for "strategic" references to the CJEU has not yet manifested itself in Dutch law.[1027] Since 2012 Dutch civil courts can also opt to make a preliminary reference to the *Hoge Raad* instead, which can provide guidance on the application of (EU) consumer law in the Dutch legal system.[1028]

5.1.2 Lack of references to Article 47 in Dutch case law

Low visibility of Article 47, despite its discursive value

Article 47 of the Charter plays a much less visible role in unfair terms cases in the Netherlands than in Spain. Most procedural issues that have arisen in the context of the UCTD are not constitutionalised, i.e. they are not approached from a fundamental rights perspective – notably with

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1024 2018 LOVCK Report, p. 37. See also Loos, *Algemene voorwaarden* (n 1023) 170.

1025 See further subsections 5.2.2 and 5.4.1.

1026 2018 LOVCK Report, p. 41. See also Ancery (n 31) 134, 139.

1027 Jasper Krommendijk, 'Van Middelburg tot Almelo. Het hoe en waarom van prejudiciële vragen aan het Hof van Justitie van de Europese Unie door Nederlandse lagere rechters' (2018) 39 Recht der Werkelijkheid 7, 12–13.

1028 See for example *Hoge Raad* 12 February 2016, ECLI:NL:HR:2016:236 (***Lindorff/Nazier***); *Hoge Raad* 8 November 2019, ECLI:NL:HR:2019:1731 (***StAR***). Two recent preliminary references to the CJEU concern the substantive legal consequences of a finding of unfairness, not the role of courts in the proceedings. Therefore, they will not be discussed in the present chapter. *Gerechtshof Amsterdam* 5 March 2019, ECLI:NL:GHAMS:2019:657 and *Gerechtshof Den Haag* 2 April 2019, ECLI:NL:GHDHA:2019:630.

the exception of arbitration clauses in consumer contracts. Vice versa, infringements of procedural safeguards or due process requirements are not consumerised, i.e. they are not specifically connected to substantive (EU) consumer law. On the one hand, there might be no need to refer to Article 47 if there are other means available to achieve the required level of judicial protection – in particular, consistent interpretation of existing (procedural) rules. On the other hand, the scarce references to Article 47 in Dutch case law might also be a result of unawareness of, or hesitation about its (potential) functions on the part of Dutch civil courts – possibly because the Netherlands does not have a constitutional tradition.[1029]

The only cases in which Dutch civil courts have explicitly referred to Article 47 of the Charter in unfair terms cases pertain to arbitration clauses. Perhaps it is not surprising that effective judicial protection as a fundamental rights issue emerges in cases about contractual terms that *exclude* the consumer's right to take legal action or exercise any other legal remedy (Annex sub (q) of the UCTD). Certain terms can make it *more difficult* for consumers to exercise their rights in court,[1030] e.g. a prohibition to assign their claim to a third party,[1031] or a clause that imposes a burden of proof they would not have otherwise.[1032] However,

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1029 T Barkhuysen, AW Bos and F Ten Have, 'Een verkenning van de betekenis van het Handvest van de grondrechten van de Europese Unie voor het privaatrecht. Deel 2: De verhouding van het Handvest tot het EVRM en de meerwaarde van het Handvest' [2011] Nederlands Tijdschrift voor Burgerlijk Recht 547. It may take some time before the CJEU's case law on Article 47 of the Charter reaches Dutch courts: Leon Timmermans, 'Het doeltreffendheidsbeginsel na Puškár. Een toekomst binnen het kader van het beginsel van effectieve rechtsbescherming?' in Henri de Waele, Jasper Krommendijk and Karin Zwaan (eds), *Tien jaar EU-Grondrechtenhandvest in Nederland* (Wolters Kluwer) 11.7.

1030 See e.g. Joined Cases C-537/12 and C-116/13 *Banco Popular Español,* para 70-71; Case C-415/11 *Aziz*, paras 73-74.

1031 See e.g. *Rechtbank Oost-Brabant* 28 June 2018, ECLI:NL:RBOBR:2018:3169; *Rechtbank Noord-Holland* 17 April 2019, ECLI:NL:RBNHO:2019:3323. Also: prohibition to go to court before request for financial compensation has been made + claim dismissed or no response *Rechtbank Oost-Brabant* 11 July 2019, ECLI:NL:RBOBR:2019:4890.

1032 See e.g. *Gerechtshof Amsterdam* 2 April 2019, ECLI:NL:GHAMS:2019:1109; *Hoge Raad* 28 September 2018, ECLI:NL:HR:2018:1800. A term reversing the burden of proof to the detriment of the consumer does not automatically qualify as unfair, but it must be examined if the term at issue alters the consumer's legal position in that it removes or hinders the consumer's procedural rights: *Lovasné Tóth*, paras 49 and 56. See for more examples JML van Duin, 'Effectieve rechtsbescherming van consumenten door de civiele rechter: een procesrechtelijk perspectief' [2019] Tijdschrift voor de Procespraktijk 138, 142.

such terms do not make it *impossible* for consumers to appear in court.[1033] Arbitration clauses, by contrast, do not determine the content of (consumer) rights or how they can be exercised, but take away a possibility to exercise them in court altogether.

The low number of references to Article 47 in Dutch case law might signify that on a systemic level, the justiciability of consumer rights under the UCTD is sufficiently ensured. No (apparent) violations of Article 47 of the Charter have been established yet. However, this could also be an 'unknown unknown': it cannot be derived from judicial decisions alone whether there any flaws in the system that remain invisible so far.[1034] Moreover, the question whether or not there is a violation of Article 47 is too black-and-white, in light of the functions identified in the previous chapters of a reference to Article 47 in judicial reasoning. Article 47 has discursive value, and it may serve as an "interpretative device"[1035] for open norms in private law and civil procedure, as the cases discussed in this chapter will show.

Space for judicial intervention

The justiciability of the rights consumers derive from the UCTD appears to be less of an issue in the Netherlands than in Spain. There are no indications that fundamental interests are insufficiently protected, or that there is an 'enforcement deficit' in respect of mandatory statutory provisions.[1036] Dutch civil courts seem to have more (*ex officio*) powers than their Spanish counterparts, e.g. to take measures of investigation – also or especially in case of uncontested claims.[1037] Restrictive procedural conditions that affect Article 47 of the Charter's core components may be less frequent in Dutch law than in Spanish law, or even absent. For

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1033 See also the differentation proposed in subsection 3.3.1.

1034 See also de Moor (n 64) 156.

1035 T Barkhuysen, AW Bos and F Ten Have, 'Een verkenning van de betekenis van het Handvest van de grondrechten van de Europese Unie voor het privaatrecht. Deel 1: De inhoud, de juridische status en het toepassingsbereik van het Handvest, in het bijzonder in horizontale verhoudingen'' [2011] Nederlands Tijdschrift voor Burgerlijk Recht 479.

1036 Opinion of AG Drijber of 23 February 2018, ECLI:NL:PHR:2018:154, points 63-64.

1037 *Hoge Raad*, judgment of 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakkers/Voets*), para 3.9.1; see further subsection 5.3.1. On the active role of the court in contentious civil proceedings, see e.g. Ruth de Bock, 'Feitenonderzoek tijdens de mondelinge behandeling' in Dineke de Groot and Hans Steenbergen (eds), *De mondelinge behandeling in civiele zaken* (Boom Juridische Uitgevers 2019) 185.

instance, a Dutch court's *failure* to perform *ex officio* control in default proceedings is not the same as a Spanish court's *inability* to do so in (mortgage) enforcement proceedings. Whilst the Dutch court could assess unfair terms, the Spanish court could not. Moreover, when there is still an opportunity for the consumer to oppose or appeal the court's decision, there is no violation of the right to an effective (judicial) remedy as such. A separate order for payment procedure such as in Spain, which combines restrictive procedural conditions with a limited scope for judicial intervention, does not exist in the Netherlands.[1038] There is no strict limitation of the debtor's grounds for challenging (mortgage) enforcement either. Thus, there is more space for judicial intervention, without the need to set procedural rules aside or to make legislative changes.

Dutch civil procedure in general appears to be less rigid.[1039] Procedural rules are to be applied by civil courts in a "deformalised" manner to provide flexibility and manageability.[1040] The deformalisation of procedural law is said to have shifted the focus to the rationale of the norms at issue and the reasonable interests of the parties that deserve (judicial) protection.[1041] A certain interpretation of procedural rules can be justified by reference to (unwritten) principles of due process ("*goede procesorde*") and a proper administration of justice ("*behoorlijke*

1038 The (European) small claims procedure is not necessarily expedited; there is room for contestation, an exchange of (written) arguments and an oral hearing: see also *Rechtbank Amsterdam* 9 March 2020, ECLI:NL:RBAMS:2020:1477.

1039 As Hartkamp has observed in a case note on Case C-32/12 *Duarte Hueros*, Spanish civil procedure is very consumer-unfriendly compared to Dutch civil procedure; in the Netherlands, a change of claim would have been possible, or a new claim could have been brought after the initial one was dismissed because the rules on *res judicata* are less strict: Arthur Hartkamp, 'Ambtshalve toepassing van Europees consumentenrecht. Een nieuw hoofdstuk: de richtlijn consumentenkoop' [2015] Ars Aequi 222.

1040 Menno Bruning, 'Over redelijke wetstoepassing en hanteerbaarheid van het Nederlands privaatrecht. Mogelijkheden en grenzen in de rechtsvormede rechtspraak op grond van de billijkheid' in R De Graaff and others (eds), *Rechtsvorming door de Hoge Raad* (Ars Aequi Libri 2016) 97–98; Ivo Giesen, *Beginselen van burgerlijk procesrecht* (Wolters Kluwer 2015) 500. See also Vincent Lindijer, *De goede procesorde. Een onderzoek naar de betekenis van de goede procesorde als normatief begrip in het burgerlijk procesrecht* (Kluwer 2006) 518–519. Lindijer makes a comparison between due process requirements and other (open) norms and doctrines, such as the 'abuse of law' ("*misbruik van bevoegdheid*") criterion.

1041 Lindijer (n 1040) 626.

rechtspleging"), in the development of which Article 6 ECHR is said to have played an important role.[1042]

It could nevertheless be argued that Article 47 of the Charter has more normative power, because it has direct effect: it can serve to set aside legislative provisions. This is neither possible on the basis of unwritten principles, nor on the basis of the Dutch Constitution, which contains a prohibition of constitutional review (Article 120). There is no constitutional court in the Netherlands, and courts are prohibited to exercise constitutional review of primary legislation (statutes).[1043] Parliament is expected to assess the constitutionality of new legislation during the legislative process. There is a national equivalent of Article 6 ECHR and Article 47 of the Charter: Article 17 of the Dutch Constitution (*Grondwet*) recognises the right of access to court.[1044] However, the prohibition of constitutional review entails that private parties have to rely on national procedural law for the effectuation of their rights.[1045] The direct effect of Article 47 stems from EU law itself and not from the Constitution, which distinguishes it from the direct effect of Article 6 ECHR in the Dutch legal order.[1046] Article 94 of the Constitution gives precedence to directly effective international provisions – such as Article 6 ECHR – over conflicting or colliding national norms, including the Constitution itself.[1047] Both Article 47 of the Charter and Article 6 ECHR

1042 Giesen (n 1040) 50–51.

1043 Jerfi Uzman, Tom Barkhuysen and Michiel L Van Emmerik, 'The Dutch Supreme Court: A Reluctant Positive Legislator?' in Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators* (Cambridge University Press 2011) 645. See also Ruben De Graaff, 'Prescription. A Private-Law Concept at the Forefront of Fundamental Rights Protection' in CG Breedeveld-de Voogd and others (eds), *Core Concepts in the Dutch Civil Code, Continuously in Motion. BW Krant Jaarboek no. 30* (Wolters Kluwer 2016) 146–148.

1044 Article 17 of the Dutch Constitution reads: "No one may be prevented against their will from being heard by the courts to which they are entitled to apply under the law." [Translation: https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf]

1045 Carla Sieburgh, 'Waarom het Unierecht de invloed van grondrechten op het privaatrecht aanjaagt en versterkt' [2015] THEMIS 3, 6.

1046 Uzman, Barkhuysen and Van Emmerik (n 1043) 673–674.

1047 Article 94 of the Constitution reads: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons."

empower Dutch courts to set aside conflicting provisions of national law in a concrete case. In addition, civil courts can disapply statutory provisions on the basis of reasonableness and fairness (Article 6:2(2) BW),[1048] sometimes in cases that could be understood as involving fundamental rights – i.e. examples of hidden constitutionalisation.[1049] They may nevertheless be reluctant to do so, especially where the legislative or executive branch has a margin of discretion.[1050] Moreover, legality review on the basis of EU law is relatively new in private law,[1051] which might be another explanation for reluctance on the part of Dutch civil courts to apply Article 47 of the Charter.

Assumption that Article 47 of the Charter and Article 6 ECHR are interchangeable

Dutch civil courts generally assume that Article 47 of the Charter and Article 6 ECHR are interchangeable,[1052] an assumption that does not do justice to Article 47's connection to EU rights.[1053] In a case concerning State liability for an alleged failure of the *Hoge Raad* (civil division) to make a preliminary reference to the CJEU, the Hague Court of Appeal expressly held that "Article 6 ECHR corresponds with Article 47 of the Charter".[1054] In another case concerning an alleged violation of the right to adjudication within a reasonable time in a European small claims procedure, the District Court of The Hague also used the term "corresponds".[1055] In both cases, the reference to the ECHR made sense

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1048 Article 6:2(2) BW reads: "A rule in force between a creditor and a debtor by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness." [Translation: http://www.dutchcivillaw.com/civilcodebook066.htm]

1049 Ruben de Graaff, 'De betekenis van de redelijkheid en billijkheid voor de bescherming van grondrechten' [2016] THEMIS 202, 213; Floor Bakker, *Billijkheidsuitzonderingen. Het wegens bijzondere omstandigheden buiten toepassing laten van wettelijke voorschriften in individuele gevallen* (Wolters Kluwer 2018) 148–149.

1050 de Graaff (n 1049) 206; Bakker (n 1049) 81–83.

1051 Carla Sieburgh, 'Het EU-Handvest van de Grondrechten en het algemene vermogensrecht. De (potentiële) betekenis van het Handvest voor rechtsverhoudingen tussen particulieren' in J Gerards, H De Waele and K Zwaan (eds), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven* (Wolters Kluwer 2015) 510.

1052 See also Barkhuysen, Bos and Ten Have (n 1029).

1053 See also subsection 2.2.2.

1054 *Gerechtshof Den Haag* 25 October 2016, ECLI:NL:GHDHA:2016:2984, para 4.3.

1055 *Rechtbank Den Haag* 23 November 2016, ECLI:NL:RBDHA:2016:14190, para 4.15.

because of the special relevance of ECtHR case law for State liability under EU law.[1056]

However, the same assumption as to the interchangeability of Article 6 ECHR and Article 47 of the Charter is made in horizontal cases between two private parties, for instance in respect of jurisdiction[1057] or challenges concerning the judge's impartiality,[1058] as well as court fees and the right of access to court.[1059] Alleged violations of fair trial rights in a concrete case are generally adjudicated under the umbrella of Article 6 ECHR, not Article 47 of the Charter, even if the case might fall – at first sight – within the scope of EU consumer law.[1060] Perhaps Dutch civil courts do not see a (clear) need to refer to Article 47 of the Charter, as a result of the ECHR being more ingrained in Dutch legal practice. The requirements of Article 47 – which are less crystallised – might be perceived as not going beyond those of Article 6 ECHR and thus, not having (much) added value. Moreover, fragmentation of procedural protection according to subject-matter may be considered as undesirable.[1061] The ECHR is not only older than the Charter; its application is not connected to EU law and therefore more general. The majority of references to Article 47 of the Charter in civil cases are trans-substantive as well, i.e. without a clear link to EU (consumer) law.

In most cases, Dutch civil courts seem to mention Article 47 of the Charter almost as an afterthought. A notable exception is a recent case on cost orders in the area of data protection, where the Court of Appeal 's-Hertogenbosch prominently referred to Article 47 to justify a deviation

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1056 See e.g. ECtHR 8 April 2014, Appl. No. 17120/09 *Dhahbi v Italy* on the failure to make a preliminary reference; Case C-385/07 *Der Grüne Punkt,* paras 177-179 on the reasonable time requirement.

1057 *Rechtbank Oost-Brabant* 31 January 2013, ECLI:NL:RBOBR:2013:BZ0842..

1058 *Gerechtshof Den Haag* 25 November 2014, ECLI:NL:GHDHA:2014:3833; *Rechtbank Zutphen* 12 January 2012, ECLI:NL:RBZUT:2012:BV1679. In these cases the link with EU law and thus, the applicability of Article 47 of the Charter was not immediately obvious. See also *Rechtbank Den Haag* 6 June 2018, ECLI:NL:RBDHA: 2018:6463, para 4.32.

1059 See e.g. *Gerechtshof Arnhem-Leeuwarden* 3 July 2014, ECLI:NL:GHARL:2014:5450; *Rechtbank Zutphen* 4 January 2012, ECLI:NL:RBZUT:2012:BV6245.

1060 See e.g. *Hoge Raad* 8 November 2019, ECLI:NL:HR:2019:1731 (*StAR*; further discussed in subsection 5.2.2 below); *Hoge Raad* 8 February 2019, ECLI:NL:HR:2019:207; *Gerechtshof Den Haag* 12 March 2019, ECLI:NL:GHDHA:2019:453.

1061 See e.g. Charlotte Vrendenbarg, *Proceskostenveroordeling en toegang tot de rechter in IE-zaken: regelingen over proceskosten getoetst aan het EU-recht* (Wolters Kluwer 2018) 62 <http://hdl.handle.net/1887/58468>; Krans (n 126) 582.

from the 'loser pays' principle adhered to in Dutch procedural law.[1062] This shows how Article 47 may have an impact on the application of procedural rules in a case concerning rights derived from EU law. The Court of Appeal concluded that the applicant, who had made an application under the Dutch Data Protection Act,[1063] could not be ordered to pay the costs of the defendant bank, even though he had lost the case on the merits.[1064] The applicant was a natural person who exercised his rights under EU law, i.e. the Data Protection Directive. In this respect, the Court of Appeal cited *Puškár*,[1065] a CJEU judgment that concerned the costs of administrative proceedings preceding judicial review; those costs cannot be excessively high. It found that a cost order would impede the applicant's position and obstruct the exercise of the right to an effective remedy before a court of law (Article 47 of the Charter).

The absence of a link with EU law in other cases on Article 47 could be an intentional spill-over.[1066] However, it also raises the question as to whether Dutch civil courts are sufficiently aware of the link between substance and procedure in the adjudication of unfair terms cases, as highlighted in the CJEU's case law on the UCTD. Article 47 of the Charter requires effective judicial protection of consumer rights under the UCTD. It follows from the CJEU's case law that the position of consumers as weaker parties must be taken into consideration from a procedural

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1062 *Gerechtshof 's-Hertogenbosch* 1 February 2018, ECLI:NL:GHSHE:2018:363. In a similar case, the District Court of The Hague adopted a more formal understanding of the right of access to court (Article 47 of the Charter): the applicant could exercise this right, and had actually done so. The District Court found that the applicant had caused unnecessary legal costs by making two almost identical applications and then withdrawing them last-minute, while indicating this would not end the dispute. Thus, a cost order was warranted: *Rechtbank Den Haag* 28 June 2019, ECLI:NL:RBDHA:2019:6302, paras 2.34-2.35.

1063 The *Wet Bescherming Persoonsgegevens* (WBP) implemented Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (**Data Protection Directive**).

1064 Above-cited judgment of 1 February 2018, para 3.8.3-3.8.5. The applicant was not exempted from paying court fees: *Gerechtshof 's-Hertogenbosch* 18 January 2018, ECLI:NL:GHSHE:2018:166, paras 2.5-2.6.

1065 Case C-73/16 *Puškár*, paras 54-60 and 75-76. See also subsection 2.2.1(i).

1066 The Dutch Council of State has held that the importance of access to an independent judicial tribunal requires that also in cases *outside* the scope of Articles 6 ECHR and 47 of Charter, exceptions may have to be made to strict admissibility requirements on the basis of court fees: decision of 6 March 2013, cited by Opinion of AG Wesseling-van Gent of 4 December 2015, ECLI:NL:PHR:2015:2663, point 2.19.

perspective as well. For instance, it could be argued that in consumer cases, the deterrent effect of costs should also be accounted for, and that *ex officio* control cannot (fully) compensate for this: if no legal action is brought, the case does not come before a court.[1067] Either way, the tendency to view procedural safeguards as trans-substantive is not consonant with the connection between substantive and procedural protection of EU (consumer) rights. This connection becomes not only visible in respect of arbitration clauses and access to court (section 5.2), but also in cases where effective judicial protection requires a broad interpretation of judicial remedies (sections 5.3 and 5.4). Whereas Dutch civil courts seem to have found solutions for procedural issues without referring to Article 47, this does not mean that the fundamental rights dimension of consumer adjudication might not become relevant for future cases.

5.2 ACCESS TO COURT

5.2.1 Arbitration clauses in consumer contracts

Van Marrum/Wolff: eliminatory function of Article 47 in its horizontal dimension

The case of *Van Marum/Wolff* is cited as an example of the use of the Charter as a source of inspiration for the interpretation of open norms, in this case Article 6:233(a) BW.[1068] It shows that Article 47 of the Charter may be triggered when consumers are deprived of their right of access to court, due to an (unfair) arbitration clause. In so far as Article 47 – in its horizontal dimension[1069] – was used as a parameter to assess the unfairness of arbitration clauses in consumer contracts, it could be ascribed an eliminatory function. The Court of Appeal that adjudicated

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1067 See also subsection 3.2.4. On the potential implications for cost orders in consumer cases, see further JML van Duin, 'Wie betaalt de rekening? De kostenveroordeling in de context van het EU-consumentenrecht' [2018] Tijdschrift voor Consumentenrecht en handelspraktijken 177.

1068 See e.g. Sieburgh, 'Het EU-Handvest van de Grondrechten en het algemene vermogensrecht. De (potentiële) betekenis van het Handvest voor rechtsverhoudingen tussen particulieren' (n 1051) 507; Jessy Emaus, 'Rechten, beginselen en horizontale directe werking van de grondrechten uit het EU-Handvest' [2015] Nederlands Tijdschrift voor Burgerlijk Recht 67, 67.

1069 See also subsections 2.3.2, 3.2.2 and 4.2.2.

the case deemed such clauses to be unfair, even though they were not (yet) on the black list at the time.[1070] Article 47 thus provided a reason to go beyond what was strictly required by (national provisions implementing) the UCTD.

Van Marrum/Wolff was a case between a consumer (Wolff) and a construction company (Bouwbedrijf Van Marrum B.V.). The consumer brought a claim for faulty performance against the company, which then invoked an arbitration clause in the General Terms and Conditions for Contracting Work in the Construction Sector (*Algemene voorwaarden voor aannemingen in het bouwbedrijf*) 1992. In first instance, the Leeuwarden District Court had held that the arbitration clause was unfair within the meaning of Article 6:233(a) BW. The clause had not been individually negotiated and its purpose was to prevent or obstruct the consumer from bringing a claim (Annex sub (q) of the UCTD).[1071] The company lodged an (interim) appeal before the Leeuwarden Court of Appeal, and argued that – at that point in time – the Dutch legislature had deliberately not placed arbitration clauses on the black list, because the quality and independence of arbitration as a means of alternative dispute resolution in consumer cases was sufficiently guaranteed.

The Leeuwarden Court of Appeal contemplated that it was not constrained by the Dutch legislator's considerations. Instead, it had to take the wording and purpose of the UCTD into account in order to comply with its obligation to ensure the Directive's full effect (Article 288(3) TFEU).[1072] Its finding that arbitration clauses are unfair in general nevertheless goes beyond what is required by the Directive (or its Annex), which makes the reference to Article 47 of the Charter all the more interesting.[1073] It implies that the link between the fundamental right of access to court and EU consumer law might warrant a higher level of protection. The Court of Appeal noted that arbitration clauses withhold from consumers the protection of the courts assigned to them by law, often without having been the subject of the contractual negotiations and without consumers being aware that they are being

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1070 *Gerechtshof Leeuwarden* 5 July 2011, ECLI:NL:GHLEE:2011:BR2500 (*Van Marrum/Wolff*).

1071 *Rechtbank Leeuwarden* 15 July 2009, ECLI:NL:RBLEE:2009:BJ2957 (*Van Marrum/Wolff*).

1072 Above-cited judgment of *Gerechtshof Leeuwarden*, para 3.6.

1073 The Court of Appeal's judgment was followed (at least once) by *Rechtbank Leeuwarden* 3 August 2011, ECLI:NL:RBLEE:2011:BR4256.

deprived of their right of access to court.[1074] The Court of Appeal found that arbitration may have certain disadvantages for consumers, compared to proceedings before a State court: there are no equivalent safeguards for the independence of the arbiter or for the application of national and EU law, notwithstanding the (presumed) expertise of the arbitral tribunal, the Arbitration Board for the Building Industry in the Netherlands (*Raad van Arbitrage voor de Bouw*). Moreover, consumers can be deterred from invoking their rights by the higher costs involved or the distance between their place of residence and the seat of the arbitral tribunal, regardless of whether they are claimant or defendant.

The question of whether and under what conditions arbitration clauses in consumer contracts are to be considered as unfair has been the subject of debate. In his Opinion on *Van Marrum/Wolff*, AG Spier had noticed a "growing aversion" to arbitration clauses in consumer contracts,[1075] but he dismissed the Court of Appeal's robust approach. He tentatively concluded that arbitration clauses are not as such unacceptable, but that in consumer contracts they should in principle be considered as unfair. It would then be up to the trader to prove that the arbitration clause is not unfair in the special circumstances of the case.[1076] According to Spier, the company in question had not brought forward any facts or circumstances that could support such a conclusion.[1077]

Unlike the Court of Appeal and AG Spier, the *Hoge Raad* refused to anticipate the black- or greylisting of arbitration clauses. It quashed the judgment on the ground that the Court of Appeal should have taken the special circumstances of the case into account instead of using an objective argumentation applicable to all arbitration clauses in consumer contracts.[1078] Remarkably, the *Hoge Raad* did not (expressly) pay attention to the exclusive effect of arbitration clauses and any concerns this may give rise to in light of the right of access to court. It also ruled that it is in principle the consumer who must prove that the arbitration clause at

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1074 Above-cited judgment of *Gerechtshof Leeuwarden*, para 3.10.

1075 Opinion AG Spier of 11 May 2012, ECLI:NL:PHR:2012:BW6135 (*Van Marrum//Wolff*), para 3.35.1, with reference to – inter alia – Case C-168/05 *Mostaza Claro*.

1076 Above-cited Opinion of AG Spier, paras 3.36, 3.40.1 and 3.40.2.

1077 Above-cited Opinion of AG Spier, paras 3.49 and 3.59.2.

1078 *Hoge Raad* 21 September 2012, ECLI:NL:HR:2012:BW6135 (*Van Marrum/Wolff*), paras 3.4-3.5. What would have happened after the judgment was quashed, remains a matter for conjecture. Upon inquiry, the lawyer who represented Van Marrum in this case affirmed that the heirs of Mr. Wolff decided not to pursue the case.

issue is unfair.[1079] This is a peculiar ruling, not only because it is usually the trader who invokes the arbitration clause and should therefore prove its validity,[1080] but also and especially because of the duty of *ex officio* control.

Signalling function ahead of legislative change

Since 2015, arbitration clauses are blacklisted: they are considered to be unfair, unless consumers are given a period of *one month* from the moment an arbitration clause is invoked against them to decide whether they would prefer to go to court instead (Article 6:236(n) BW).[1081] According to the Dutch legislator, the main reason for blacklisting arbitration clauses that do not leave consumers any choice is that consumers would otherwise be deprived – without being aware of it and/or against their will – of the protection of the courts assigned to them by law.[1082] The Dutch legislator referred, inter alia, to *Asturcom*[1083] and *Van Marrum/Wolff*. In this respect, the decision could be seen as an example of a reference to Article 47 in its signalling function, ahead of legislative change.

In the meantime, the Amsterdam Court of Appeal had already followed the Leeuwarden Court of Appeal, with reference to Article 47 of the Charter.[1084] In addition to the disadvantages of arbitration pointed out by the Court in Leeuwarden, the Court in Amsterdam considered that the costs of arbitration were much higher than the costs of ordinary civil proceedings, and it did not seem plausible that arbitral proceedings would have been significantly faster in this case. According to the Court, it did not matter whether the arbitration clause was part of the general

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1079 Above-cited judgment of *Hoge Raad*, para 3.4.

1080 See also *Rechtbank Rotterdam* 18 May 2011, ECLI:NL:RBROT:2011:BQ5670, para 4.6.

1081 Article 6:236(n) BW 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."

1082 *Kamerstukken* (Parliamentary Papers) II, 2012/2013, 33 611, nr. 3, p. 7. See also Opinion of AG Hartlief of 6 July 2018, ECLI:NL:PHR:2018:788, point 5.31.

1083 Case C-40/8 *Asturcom*; discussed in subsection 3.2.2.

1084 *Gerechtshof Amsterdam* 17 April 2012, ECLI:NL:GHAMS:2012:BX3835.

terms and conditions or of the contract itself, as long as it could be qualified as a standard term falling within the scope of unfair terms control. It did not matter either that the clause at issue had been negotiated with consumer organisations, if only because each individual case needed to be assessed on its own merits. There may still be circumstances that render the clause unfair, for instance when the consumer did not get a real opportunity to make an informed choice at the time of concluding the contract.[1085]

Both Courts of Appeal relied on Article 47 of the Charter as one of the reasons to deem arbitration clauses in consumer clauses unfair. Some lower courts arrived at the same conclusion by merely referring to the UCTD's (non-binding) Annex.[1086] Other lower courts arrived at the opposite conclusion, considering that arbitration clauses could only be deemed unfair if the special circumstances of the case lead to that conclusion.[1087] Pavillon has nevertheless argued that there are no (abstract or concrete) circumstances that could justify a restriction of consumers' right of access to court by removing their choice between arbitration and a State court upfront. The restriction of this right and the corresponding lack of guarantees for a fair trial and/or the application of national and EU (consumer) law should be decisive; these 'objective' disadvantages go beyond the individual consumer.[1088]

Now that arbitration clauses in consumer contracts have been blacklisted, the question arises whether there is still a role for Article 47 of the Charter in the unfairness assessment of such clauses.[1089] The black list emphasises (the absence of) consent rather than a comparison between arbitration and court proceedings as such. Consumers waive judicial protection if they do not object within one month after an arbitration clause is invoked against them. However, the mere fact that an arbitration clause respects the one-month period does not automatically make it valid.[1090] The circumstances of the case remain

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1085 See further subsection 5.2.2 below.

1086 See e.g. *Rechtbank Amsterdam* 17 December 2008, ECLI:NL:RBAMS:2008:BH1368, para 3.4.

1087 See e.g. *Rechtbank Gelderland* 10 April 2013, ECLI:NL:RBGEL:2013:CA0523.

1088 Case note Pavillon (*TBR* 2012/19), para 8.

1089 Heidi van Ginkel, *Het arbitragebeding in algemene voorwaarden* (Celsus juridische uitgeverij 2013) 46–48.

1090 Opinion of AG Valk of 12 July 2019, ECLI:NL:PHR:2019:769 (*StAR*), points 3.22 and 3.29. See also Dorien Thiescheffer, *E-court naast overheidsrechtspraak. Online rechtspraak*

relevant, such as the question whether consumers have been informed about their rights and whether the arbitration proceedings are sufficiently balanced. Here, Article 47 of the Charter might still play a role, in particular in respect of the rights of defence.[1091]

Pharma Slovakia: a rhetorical function of Article 47

The question arises to what extent Article 47 of the Charter warrants a restrictive interpretation of the parties' intention to submit a dispute to arbitration, in the context of the UCTD. It could be argued that when a consumer does not object to arbitration, this is not the same as tacitly accepting, let alone expressly agreeing.[1092] In this respect, the consumer's weaker position plays an important role, as opposed to non-consumer cases where the parties are presumed to have equal knowledge and bargaining power. The extra scrutiny exercised towards arbitration clauses in consumer cases may be extended to other weaker parties, as demonstrated by *Pharma Slovakia*, a case between a limited partnership and one of its partners.[1093] Again, this goes beyond what is required by (national provisions implementing) the UCTD.

The partner involved had brought a claim against the company for payment of benefits. After the company invoked an arbitration clause in the partnership agreement, the court in first instance had ruled that it was not competent to hear the claim. In appeal, it was argued by the partner, who challenged the arbitration clause, that both the clause itself and the intention of the parties should be interpreted restrictively in light of the right of access to court.[1094] The partner also invoked the UCTD, or rather: its consequential effect (*reflexwerking*), because it was strictly speaking not applicable.[1095] The Court of Appeal Arnhem-Leeuwarden

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als alternatieve geschilbeslechting en de garanties voor consumenten (Celsus juridische uitgeverij 2018) 66.

1091 See also Thiescheffer (n 1090) 108.

1092 See e.g. *Rechtbank Amsterdam* 25 January 2019, ECLI:NL:RBAMS:2019:1339, para 3.6. See also Marte Knigge and Pauline Ribbers, 'Arbitrage, afstand van recht en artikel 6 EVRM' (2017) 20 Tijdschrift voor Arbitrage 35; Thiescheffer (n 1090) 70.

1093 *Gerechtshof Arnhem-Leeuwarden* 11 July 2017, ECLI:NL:GHARL:2017:5961 (***Pharma Slovakia***), para 6.20.

1094 *Gerechtshof Amsterdam* 1 March 2011, ECLI:NL:GHAMS:2011:BR1722, para 2.10. See also *Rechtbank Rotterdam* 18 May 2011, ECLI:NL:RBROT:2011:BQ5670, para 4.5.

1095 On reflexwerking, see further Alain Ancery and Charlotte Pavillon, 'Processuele aspecten van reflexwerking van consumentenrecht' (2014) 145 Weekblad voor privaatrecht, notariaat en registratie 647; Carlotta Rinaldo, 'Beyond Consumer Law –

considered that the position of the partner was similar to that of a consumer, in terms of knowledge and bargaining power. Moreover, the Court found that the arbitration clause at issue was comparable to a standard term, because it was not a core term and had not been individually negotiated. But, given the circumstances of the case, the clause did not lead to a significant imbalance between the parties (within the meaning of Article 3 UCTD and the Annex sub q):[1096] the clause referred to the Dutch Arbitration Institute (NAI), an independent and impartial arbitral institution with sufficient expertise; costs and distance were not a problem; and the appellant had not contested that arbitration clauses are common in partnership agreements.

The Court of Appeal Arnhem-Leeuwarden found the approach taken in *Van Marrum/Wolff* too "categorical".[1097] It held that, while Article 47 of the Charter and Article 17 of the Constitution both safeguard the fundamental right of access to court, Article 17 allows for an exception in case of consent (see also Article 1021.1 Rv). The requirement of consent is met if there is a valid arbitration agreement, even in the case of an arbitration clause that is comparable to a standard term. This seems to imply that Article 47 of the Charter would call for more scrutiny, although it was strictly speaking not applicable in this case. The reference to Article 47 is more than just ornamental: it shows awareness of the fundamental right at stake, and has persuasive authority as to the rationale of judicial protection in this context. It thus fulfils a **rhetorical function**,[1098] which could be seen as a weaker version of Article 47's signalling function; it does not question the existing norms as such. Furthermore, it has spill-over effect: the parallel with consumers and the lack of consent may inspire a closer examination of factors that could

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Small Enterprises, Independent Contractors and Other Professional Weak Parties' (2019) 15 European Review of Contract Law 227.

1096 In this respect, the Court of Appeal referred to *Hoge Raad* 21 April 2017, ECLI:NL:HR:2017:773, paras 3.5.4-3.5.6.

1097 *Gerechtshof Arnhem-Leeuwarden* 11 July 2017, ECLI:NL:GHARL:2017:5961 (*Pharma Slovakia*), para 6.21.

1098 Derived from Smits (n 366) 24; Cherednychenko (n 71) 505. Cherednychecnko refers to a "weak indirect horizontal effect of fundamental rights" which "ensures that the values underlying fundamental rights are respected in contract law" and thus "contributes to the development of contract law rules with a view to protecting the weaker party, but at the same time preserves the leading role of contract law in deciding disputes between private parties".

render an arbitration clause unfair.[1099] Such a spill-over effect would show how Article 47 has the potential to increase judicial protection outside the scope of the UCTD as well.

5.2.2 *StAR* case: intensity of judicial review of arbitral awards

In 2019, the Amsterdam District Court made a preliminary reference to the *Hoge Raad* in a case pertaining to a private arbitration institute (*Stichting Arbitrage Rechtspraak Nederland*; **StAR**). The case concerned judicial review of arbitral awards and consumers' fundamental right of access to court – albeit without explicitly mentioning Article 47 of the Charter. It nevertheless shows how a reference to the right of access to court may have an empowering function in respect of the role of courts, similar to the reference to Article 47 by AG Trstenjak in her opinion on *Asturcom*.

The difference between this case and *Van Marrum/Wolff* is twofold: (i) the consumer is the *defendant* and (ii) judicial review takes place *ex post*, i.e. when the arbitration has already taken place and resulted in an arbitral award. Under Dutch law, if no action for annulment of an arbitral award is brought within three months, it becomes final and its enforcement can only be refused when the arbitral proceedings or the award itself are *prima facie* contrary to public policy.[1100] Leave for enforcement of an arbitral award is usually granted *ex parte*, i.e. without hearing the other party, and the request is only dealt with summarily. This does not account for unfair terms control, which extends to arbitral awards. There were doubts as to how intensive the judicial review of arbitral awards should be in consumer cases, and what should happen in the case of a lack of information about the course of the arbitration proceedings. More specifically, the question was to what extent the court must be able to verify that the one-month period of Article 6:236(n) BW has been observed and that the consumer was sufficiently informed about the differences between arbitration and court proceedings, particularly in terms of costs and the possibilities to oppose or appeal an

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[1099] See also *Rechtbank Gelderland* 20 July 2016, ECLI:NL:RBGEL:2016:4868, para 2.9; *Rechtbank Gelderland* 20 March 2019, ECLI:NL:RBGEL:2019:1175.

[1100] Articles 1063.2 and 1065.1(e) Rv.

arbitral award vs. a judicial decision.[1101] In the course of enforcement proceedings, the court normally receives only the arbitral award and does not carry out an elaborate examination. This means that the court will usually neither have information about (procedural) irregularities, if any, nor engage in a thorough investigation. Often, it cannot be derived from the award itself whether it is based on an unfair arbitration clause, and sometimes not even whether it involves a *consumer*-defendant.

In the *StAR* case, the *Hoge Raad* held that the fundamental nature of the right of access to court entails that the court should check, if necessary *ex officio*, whether the one-month period has been observed.[1102] In this respect, a distinction can be made between the potential unfairness of an arbitration clause and other (substantive) terms on which the claim is based.[1103] *Ex officio* control of the latter is based on public policy as a *prima facie* ground to refuse enforcement of the arbitral award at issue. An unfair arbitration clause, by contrast, results in an invalid arbitration agreement. The *Hoge Raad* thus allows for a broader scope of judicial review, with due regard to the parties' right to be heard.[1104]

For creditors, arbitration may provide an alternative route for debt collection that is easier, faster and cheaper than the judicial system. As a recent controversy about a private foundation called e-Court shows,[1105] several aspects of this may be problematic from the perspective of Article 47 of the Charter. E-court provided an online arbitration tool, which was used by professional creditors to quickly obtain an enforceable title. This effectively allowed them to circumvent judicial control. In some cases, the power to submit disputes to e-Court was unilateral, i.e. only the trader could do so – which could be seen as

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1101 *Rechtbank Amsterdam* 27 February 2019, ECLI:NL:RBAMS:2019:1338, paras 3.6-3.7 and 3.11.

1102 *Hoge Raad* 8 November 2019, ECLI:NL:HR:2019:1731 (*StAR*), para 2.8.7.

1103 Ibid, para 2.5.5. See also the above-cited Opinion of AG Valk, point 4.20.

1104 Above-cited judgment of *Hoge Raad*, para 2.5.7. The Supreme Court had already held that the fundamental nature of the right of access to court entails that the question whether a valid arbitration agreement has been concluded must ultimately be answered by a court: *Hoge Raad* 26 September 2014, ECLI:NL:HR:2014:2837, para 4.2.

1105 For this subsection, 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. See further Thiescheffer (n 1090); Emma van Gelder, 'Online Dispute Resolution: een veelbelovend initiatief voor toegang tot het recht?' [2018] Maandblad voor Vermogensrecht 262.

running counter to the principle of equality of arms. Moreover, the time-limit for the consumer to submit a defence was very short (approximately 1 week); the one-month period was not always observed.[1106] If no defence was submitted, a standardised award would be generated, which merely referred to the case file for the claimed amount and other case-specific information.[1107] 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 (repeat players). An action for annulment of an arbitral award issued by e-Court against a consumer would hardly ever be initiated by the consumer in question.[1108] The solution proposed by the 2018 LOVCK Report is that the court must refuse to grant leave for enforcement, if the award appears to be based on an unfair arbitration clause or if it cannot be verified that unfair terms control has taken place. The necessary information must be provided in the arbitral award itself, possibly substantiated with documents from the case file.[1109]

In his Opinion on the above-mentioned *StAR* case, AG Valk asserted that the fundamental nature of the right of access to court entails that the court's examination of an arbitration clause cannot be limited to a summary investigation.[1110] In this respect, Valk did refer to *Asturcom*, but only mentioned Article 6 ECHR, not Article 47 of the Charter. The court must check whether the arbitration clause contains the mandatory period of (at least) one month and whether this period has been observed in practice. The mere fact that the arbitral award itself confirms that this period has been observed is not sufficient in this regard.[1111] The court must also examine other circumstances that may render the term unfair, also if the one-month period has been observed.[1112] The court must respect the (trader's) right to be heard, whether or not the consumer-defendant has entered an appearance.[1113] If the court finds that the

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1106 *Rechtbank Amsterdam* 30 January 2018, ECLI:NL:RBAMS:2018:419.

1107 *Rechtbank Amsterdam* 27 March 2017, ECLI:NL:RBAMS:2017:2427.

1108 Thiescheffer (n 1090) 70.

1109 2018 LOVCK Report, pp. 73-79.

1110 Opinion of AG Valk of 12 July 2019, ECLI:NL:PHR:2019:769 (*StAR*), points 1.4, 4.20 and 6.2(a).

1111 Point 6.2(i), (k) and (l).

1112 Point 6.2(o).

1113 Point 6.2 (c) and (d).

arbitration clause is indeed unfair and/or the one-month period has not been observed, enforcement of the award must be refused.[1114]

The *Hoge Raad* followed the AG's Opinion, by reference to the effective (judicial) protection of consumers under the UCTD.[1115] The broadened scope for judicial review in the course of enforcement of arbitral awards reminds us of the Spanish (and Polish) cases discussed in chapters 3 and 4.[1116] It could be argued that, similar to order for payment procedures, arbitration should not turn into an avenue for creditors to deprive consumers of their (EU) rights, including the right to effective judicial protection guaranteed by Article 47 of the Charter. It is not only about ensuring compliance with the UCTD, but also – and even more compellingly – about guaranteeing the consumer's fundamental right of access to court.

5.3 EFFECTIVE (JUDICIAL) REMEDY

5.3.1 The notion of effective legal or judicial protection in Dutch law

The notion of effective legal or judicial protection (*effectieve rechtsbescherming*" as such has not played a major role in Dutch unfair terms cases – let alone as a fundamental right. According to Giesen, it is not (yet) a principle of Dutch civil procedure; in his view there is no clear distinction with access to court. At the same time, he has acknowledged that in the context of EU law, effective judicial protection is broader; it encompasses an effective remedy as well.[1117]

Indeed, previous chapters have shown that Article 47 of the Charter – read in conjunction with the UCTD – requires the availability of judicial remedies against, inter alia, the enforcement of claims by creditors against consumer-debtors. Unlike in Spain, there is no separate order for payment procedure in the Netherlands. The debate about judicial review of arbitral awards nevertheless shows how creditors in the Netherlands are looking for alternative routes to obtain enforceable titles against

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1114 Point 6.2(h), (m) and (n).

1115 Above-cited judgment of *Hoge Raad*, para 2.5.5 and 2.8.4.

1116 See, in particular, Case C-49/14 *Finanmadrid*, Case C-503/15 *Margarit Panicello*, Case C-176/17 *Profi Credit Polska* and Case C-623/17 *PKO Bank Polski*; discussed in section 3.2.

1117 Giesen (n 1040) 99–100.

(consumer-)debtors as well. It would go beyond the scope of this study to examine to what extent this is caused by *ex officio* control of unfair terms in default proceedings, where the role of the court is usually limited to an examination if (i) the procedural requirements have been met and (ii) the claim does not appear to be unlawful or unfounded (Article 139 Rv). Some courts exercise extra scrutiny when repeat players are involved, i.e. creditors that bring large numbers of claims.[1118] Repeat players may count on the fact that many (consumer-)debtors do not contest the claim, because they are unaware of their rights or for other reasons, such as (the threat of) high costs in relation to the claimed amount. Not only could this lead to the settlement of unfounded claims, e.g. claims that are (partially) based on unfair terms, it could also undermine the (substantive and procedural) rights of consumer-defendants as weaker parties.[1119] Courts try to put a check on this by dismissing the claim when it is not sufficiently substantiated[1120] and/or by issuing a higher costs order on the basis of 'abuse of process' (*misbruik van procesrecht*).[1121] Since this is a broader issue than effective judicial protection under the UCTD, I will suffice with the observation that (further) dejudicialisation of the debt collection process could be problematic in light of Article 47.[1122]

In the Netherlands, neither the UCTD nor Article 47 of the Charter plays any role of significance in the context of mortgage enforcement. An inquiry into the reasons behind this would fall outside the scope of this study. As we have seen in chapter 4, the Spanish mortgage cases have arisen in a specific socio-economic context. A similar flood of cases did not occur in the Netherlands, at least not on the same scale. Perhaps

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1118 de Moor (n 1012) 234; Alain Ancery and Cindy Seinen, 'Vorderingen in b2c-verstekken: toetsen of toewijzen?' [2015] Tijdschrift voor Civiele Rechtspleging 77, 84–85; Cindy Seinen, 'De waarheidsplicht en de geraden gevolgtrekking anno 2020: een zoektocht naar proportionaliteit' [2020] Tijdschrift voor Civiele Rechtspleging 33, 39–40.

1119 *Rechtbank Amsterdam* 27 March 2020, ECLI:NL:RBAMS:2020:2002, para 5. See also Case C-618/10 *Banesto*; discussed in subsection 3.2.3.

1120 On the basis of Articles 21 and 111 Rv. See e.g. *Rechtbank Amsterdam* 9 November 2018, ECLI:NL:RBAMS:2018:7770; *Rechtbank Den Haag* 2 July 2019, ECLI:NL:RBDHA:2019:7920. Seinen has observed this does not constitute a violation of the right of access to court (Article 47 of the Charter): Seinen (n 1118) 38.

1121 See e.g. *Rechtbank Limburg* 26 July 2017, ECLI:NL:RBLIM:2017:7453; *Rechtbank Amsterdam* 16 October 2017, ECLI:NL:RBAMS:2017:7577.

1122 See also subsections 3.2.3 and 4.2.3. See further van Duin (n 1032) 142.

Dutch judges and legal practitioners have not realised that the duty of unfair terms control (*ex officio*) extends to enforcement disputes; perhaps the existing procedural safeguards and the provided level of judicial protection are generally considered to be sufficient.[1123] In this respect, one could argue that if there is no (apparent) violation of Article 47 of the Charter, there is no need to refer to it.

5.3.2 Persuasive authority in respect of norms with a protective purpose

SEBA: an expansive interpretation of remedies

This is not to say that Dutch civil courts never refer to the notion of effective judicial protection at all. The *Hoge Raad* has adopted "*effectieve rechtsbescherming*" as a (national) criterion to assess the admissibility of collective actions; combining or grouping interests must promote an efficient and effective legal protection against an infringement of those interests.[1124] In the Explanatory Memorandum on the introduction of a collective action in Dutch law (Article 3:305a BW), it is observed that 'efficient' refers to procedural economy, and 'effective' to the effective enforcement of norms that aim to protect a certain group of interested parties.[1125] Whilst this criterion does not (directly) stem from EU law, it shows that Dutch civil courts are familiar with reasoning based on such a notion. It may serve as an argument to justify a certain (procedural) solution and/or to fill a (legislative) gap, especially when norms with a

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1123 See e.g. a case concerning interest rates where the bank's right to enforcement was examined without any reference to EU consumer law: *Rechtbank Rotterdam* 11 May 2016, ECLI:NL:RBROT:2016:6438. In a case note on *Sánchez Morcillo*, Mak refers to a decision of the District Court Amsterdam where the bank's conduct – to resort to mortgage enforcement at times of crisis – was deemed an 'abuse of rights' (*misbruik van recht*): *Rechtbank Amsterdam* 13 May 2013, ECLI:NL:RBAMS:2013:CA0869. As Mak points out, this pertains to the exercise of (contractual) rights rather than the potential unfairness of standard terms and conditions in the mortgage loan agreement: C Mak, 'Noot Bij HvJ EU 17 Juli 2014, C-169/14 Sánchez Morcillo' EHRC 2014/234.

1124 See e.g. *Hoge Raad* 11 December 1987, ECLI:NL:HR:1987:AC2270. The criterion is also applied in collective actions (partially) pertaining to standard terms and conditions in consumer contracts, see e.g.: *Gerechtshof Amsterdam* 11 July 2013, ECLI:NL:GHAMS:2013:1966; *Rechtbank Den Haag* 28 October 2015, ECLI:NL:RBDHA:2015:12213.

1125 Kamerstukken (Parliamentary Papers) II, 1992/1993, 22 486, nr. 3, p. 5.

protective purpose are at stake and/or no effective judicial remedy would be available otherwise.[1126]

An example can be found in the so-called *SEBA* case concerning a collective action in the context of the UCTD. Consumer protection organisations do not enjoy the same level of (judicial) protection as individual consumers.[1127] But in his Opinion on the *SEBA* case, AG Wissink used "*effectieve rechtsbescherming*" as one of the arguments for an expansive, consumer-friendly interpretation of statutory provisions providing for two distinct types of legal remedies (in the sense of: causes of action).[1128] Even though the case did not concern a fundamental rights issue, it indirectly enhanced the effective judicial protection of consumers. This could be seen as a spill-over effect of EU (consumer) law into the realm of national law.

The case was brought by a foundation representing the interests of holders of a long-term ground lease in Amsterdam (*Stichting Erfpachters Belang Amsterdam*; **SEBA**), as well as a number of individual leaseholders, against the city of Amsterdam. There was a dispute about the validity of the rent revision clause in the general conditions of the ground lease. The rent was unilaterally revised in 2006-2009, based on a binding decision of experts. The claimants argued that the clause allowing for unilateral revision was unfair. In the actions brought by the individual leaseholders, the Amsterdam Court of Appeal had annulled the clauses at issue. In the collective action, however, the Court had referred the case to the Court of Appeal in The Hague. Pursuant to Article 6:240 BW, this Court of Appeal has exclusive jurisdiction to issue a declaratory judgment – an injunction – that specific stipulations are unfair.[1129] The declaratory judgment may contain an additional prohibition to use or to promote the stipulations at issue. If the party who uses these stipulations

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1126 Giesen pp. 94-96, with reference to e.g. *Hoge Raad* 27 November 2009, ECLI:NL:HR:2009:BH2162, para 14.11.1-2 (*World Online*). See also e.g. *Gerechtshof Arnhem-Leeuwarden* 28 August 2018, ECLI:NL:GHARL:2018:7753; *Gerechtshof Arnhem-Leeuwarden* 5 February 2019, ECLI:NL:GHARL:2019:1060.

1127 See also subsection 3.4.3. On the same issue: Freerk Vermeulen and Tanja Schasfoort, 'Ambtshalve toetsing aan Unierecht ten gunste van belangenorganisaties?' [2017] Tijdschrift voor Civiele Rechtspleging 89.

1128 Opinion of AG Wissink of 22 January 2016, ECLI:NL:PHR:2016:3 (*SEBA*).

1129 The provision is an implementation of Directive 2009/22/EC on injunctions for the protection of consumers' interests (OJ L 110, 1 May 2009, p. 30).

keeps using them, they are voidable by any other person who enters into a contract with that party (Article 6:243 BW).

Because most underlying contracts had been concluded before 31 December 1994, the case largely fell outside the temporal scope of the UCTD. In respect of contracts concluded in 2000, however, the *Hoge Raad* interpreted Article 6:233 BW in conformity with the Directive. It held that the possibility of an action on the basis of Article 6:240 BW does not preclude a collective action within the meaning of Article 3:305a BW.[1130] A 6:240-action calls for a preventive, abstract assessment resulting in a judgment that can be invoked by third parties. By contrast, a 3:305a-action pertains to concrete legal relationships between the defendant and its contractual counterparties, whose interests are collectively represented.[1131] AG Wissink had submitted that the distinction between the two types of actions should therefore not be applied too strictly. They are not mutually exclusive, and should not be split up between two different courts.[1132]

The *Hoge Raad* adopted the proposed solution.[1133] This shows how the notion of effective judicial protection has persuasive authority; it may serve as a justification for an expansive interpretation of the remedies available to consumer protection organisations, which leads to a higher level of protection than prescribed by EU (consumer) law. A parallel could be drawn here with the rhetorical value of Article 47 as discussed in the previous section, as well as the hermeneutical function of (full) effectiveness discerned by Reich.[1134] A comparable mechanism is visible in an earlier case, where the *Hoge Raad* had adopted a lenient approach towards the interruptive effect of a collective action on the basis of

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1130 *Hoge Raad* 29 April 2016, ECLI:NL:HR:2016:769 (*SEBA*), paras 4.6.2-4.6.3.

1131 On third party effect of collective actions see also subsection 4.5.3. See further Charlotte Pavillon, 'De derdenwerking van collectieve acties tegen onredelijke bedingen in het licht van de Europese rechtspraak' [2016] Tijdschrift voor Consumentenrecht en handelspraktijken 160.

1132 Opinion of AG Wissink of 22 January 2016, ECLI:NL:PHR:2016:3 (*SEBA*), point 9.12.4.

1133 The case was referred to the Court of Appeal in The Hague for further adjudication – of the individual actions and the collective action together: *Gerechtshof Den Haag* 19 September 2017, ECLI:NL:GHDHA:2017:2894. SEBA also brought a new, separate action on the basis of Article 6:240 BW before the Court of Appeal in The Hague in respect of the general conditions of the ground lease the city of Amsterdam enacted in 2016: see *Gerechtshof Den Haag* 12 March 2019, ECLI:NL:GHDHA:2019:453.

1134 See subsection 2.5.1.

Article 3:305a BW in respect of running limitation periods.[1135] It held that this interruptive effect should extend to all individual claims fitting in with the collective action, in the interest of the efficient and effective legal protection the collective action aims to achieve.

That there is no reference to Article 47 of the Charter does not mean cases like these could not fall within its scope. Prescription periods and time-limits are not beyond the reach of EU (consumer) law and therefore, not beyond the reach of Article 47 either.[1136] In the *SEBA* case, there was no (apparent) violation: the limitation period is three years after the day the unfairness of a specific clause is invoked (in a collective action or by an individual consumer), i.e. it starts running when the consumer could have become aware of its unfair nature and could have brought a legal action.[1137] Moreover, prescription does not apply if the unfairness is invoked as a defence,[1138] which according to AG Wissink extends to *ex officio* control in cases concerning claims against consumers. In that case, effective judicial protection as a fundamental right does not come into play either.[1139] However, this might be different if time-limits are too short or consumers' procedural rights are excessively restricted otherwise, as discussed in chapter 3.

Lindorff/Nazier: spill-over effect to purely national matters

Another example of the rhetorical value of the notion of effective judicial protection can be found in *Lindorff/Nazier*, a case concerning mobile

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1135 *Hoge Raad* 9 October 2015, ECLI:NL:HR:2015:3018, para 3.5.4

1136 See e.g. Case C-616/18 *Cofidis v YU, ZT*, Opinion of AG Kokott in C-616/18, points 64 and 85; Case C-224/19 (pending), ECLI:ES:JPI:2019:1A. On prescription in the context of the UCTD, see further Charlotte Pavillon, 'Beter ten hele gedwaald dan ten halve gekeerd? De verjaring van de sanctie op oneerlijke bedingen' [2019] Weekblad voor privaatrecht, notariaat en registratie 621; Daniël Stein, 'Verjaring en Unierecht' in V Tweehuysen and SE Bartels (eds), *Verjaring* (Wolters Kluwer 2020). On the fundamental rights dimension of prescription, see De Graaff (n 1043) 144–145. De Graaff observes that it may be difficult to determine the required (minimum) level of protection when one party's fundamental right of access to court must be balanced against another fundamental right or against other interests, such as legal certainty and the other party's legitimate expectations.

1137 Article 6:235(4) jo 3:51(1) sub d BW.

1138 Article 3:51(3) BW.

1139 Opinion of AG Wissink of 22 January 2016, ECLI:NL:PHR:2016:3 (*SEBA*), para 10.8. See also *Gerechtshof Den Haag* 12 March 2019, ECLI:NL:GHDHA:2019:453, para 2.14, with reference to Article 6 ECHR instead of Article 47 of the Charter.

phone subscriptions with an all-in price including a 'free' device.[1140] The *Hoge Raad* held that Dutch courts are obliged to exercise *ex officio* control in respect of both Article 7:61(2) BW, which implements the Consumer Credit Directive,[1141] and Article 7A:1576 BW on purchase in instalments, even though Article 7A:1576 BW is not of European origin. The *Hoge Raad* put Article 7A:1756 BW on an equal footing with Article 7:61 BW for the sake of manageability and an effective protection of consumer interests.[1142] According to the *Hoge Raad*, a violation of the requirements of Article 7:61(2) BW could lead to annulment of the contract, even though the law does not define a separate sanction.[1143] The *Hoge Raad* emphasised the importance of ensuring "*effectieve rechtsbescherming*" for consumers, if necessary of the court's own motion, tailored to the circumstances of the case and with due regard for the right to be heard.[1144] In the words of the *Hoge Raad*, "provisions that are aimed at the protection of consumers" require adequate measures ensuring effective judicial protection.[1145]

The solution adopted by the *Hoge Raad* did not follow from the principles of equivalence and effectiveness, because the case concerned purely national provisions. The maxim *ubi ius, ibi remedium* has persuasive authority, also in cases falling outside the scope of EU law.[1146] Ancery and Seinen have observed that in the context of consumer law, this notion can even be a more compelling argument for *ex officio* control than public policy.[1147] The *Hoge Raad* used it in *Lindorff/Nazier* to reinforce an active role of courts,[1148] and to justify application of the remedy of

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1140 *Hoge Raad* 12 February 2016, ECLI:NL:HR:2016:236 (*Lindorff/Nazier*).

1141 Directive 2008/48/EC on credit agreements for consumers (OJ L 133, 22 May 2008, p. 66).

1142 Above-cited judgment of *Hoge Raad*, paras 3.11.1 and 3.11.2.

1143 Above-cited judgment of *Hoge Raad*, para 3.7.3.

1144 Above-cited judgment of *Hoge Raad*, paras 3.8.2, 3.9 and 3.11.1

1145 Above-cited judgment of *Hoge Raad*, para 3.8.2

1146 See also Giesen (n 1040) 95. As observed by the deputy Procurator General Langemeijer and Advocate General Wissink at the Supreme Court in the famous *Urgenda* case, effective judicial protection requires that norms are upheld and that rights can be *actually* enforced in court: Opinion of 13 September 2019, ECLI:NL:PHR:2019:887 (*Urgenda*), point 4.197.

1147 Ancery and Seinen (n 1118) 78. See also Opinion of AG Wissink of 21 December 2012, ECLI:NL:PHR:2012:BY7854 (*Heesakkers/Voets*), points 3.19 and 3.36; Opinion of AG Wissink of 23 September 2016, ECLI:NL:PHR:2016:938, point 3.45

1148 See also e.g. *Gerechtshof Arnhem-Leeuwarden* 4 September 2018, ECLI:NL:GHARL:2018:7970, para 4.4.

annulment in the absence of a specific legislative provision. It may thus provide a justification for "spontaneous harmonisation",[1149] where it is used as an argument to expand *ex officio* control to purely national matters.

In a later (non-consumer) case, however, the *Hoge Raad* expressly linked the duty of *ex officio* control (in appeal) to the public policy character of national provisions that do not stem from EU law.[1150] The question is whether such provisions purport to protect public interests of such a fundamental nature that their enforcement should not be hampered by procedural restrictions. This appears to be a stricter test than the one applied in *Lindorff/Nazier*. The *Hoge Raad* reiterated this formula in the above-mentioned *StAR* case, in respect of a national provision on extrajudicial costs (Article 6:96(6) BW). Whilst this provision is intended to protect consumers, it does not concern public policy or EU law.[1151] Thus, there are limits to the spill-over effect discussed in this section.

The debate on what effective judicial protection entails in consumer cases and when *ex officio* control is required, is far from settled. As Hartkamp has noted,[1152] problems mainly seem to arise in special procedures such as the enforcement of arbitral awards or in appellate proceedings. The latter will be discussed in the next section.

5.4 EQUALITY OF ARMS

5.4.1 *Ex officio* control within the ambit of the dispute in appeal

Asbeek Brusse: no systemic issue with justiciability in appeal

The case law as regards appellate proceedings shows how Dutch civil courts, and the *Hoge Raad* in particular, have found ways to ensure the

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1149 Marco Loos, *Spontane harmonisatie in het contracten- en consumentenrecht* (Vossiuspers 2006); Krans (n 126) 585.

1150 *Hoge Raad* 1 June 2018, ECLI:NL:HR:2018:818.

1151 *Hoge Raad* 8 November 2019, ECLI:NL:HR:2019:1731 (*StAR*), para 2.9.3. AG Valk had argued for *ex officio* control to ensure consistency between European and national law: Opinion of AG Valk, point 5.4 and 6.4.

1152 Arthur Hartkamp, 'De verhouding tussen twee Europese "remedies": lidstaataansprakelijkheid en ambtshalve toepassing van de richtlijn oneerlijke bedingen' [2016] Ars Aequi 658, 662.

effective judicial protection of consumers without resorting to Article 47 of the Charter.

A question that came up in *Asbeek Brusse* was what is required from the Court of Appeal in so far as the case is adjudicated in two instances.[1153] In appellate proceedings, the ambit of the dispute is strictly limited to the part(s) of the judgment against which objections have been raised.[1154] Until *Asbeek Brusse*, it was unclear whether and to what extent courts of appeal could or should perform *ex officio* control; there is a delicate balance between observing the strict rules governing appellate proceedings and ensuring the UCTD's (full) effectiveness.[1155]

Asbeek Brusse concerned a claim based on a residential tenancy agreement for the payment of rent due, contractual interest and a penalty for late payments. In first instance, the claim was granted. The tenants brought an appeal, arguing that the penalty should be mitigated, without invoking the clause's potential unfairness – which would free them from being bound by its effects.[1156] The Amsterdam Court of Appeal made a preliminary reference to the CJEU to ask whether the case fell within the scope of the UCTD (the CJEU found it did), whether the Court of Appeal must perform *ex officio* control (the CJEU found it must) and whether it could mitigate the penalty instead of disapplying it (the CJEU found it could not). In respect of *ex officio* control, the CJEU held this to be a matter of equivalence, i.e. the Court of Appeal must perform unfair terms control where it has the power to examine of its own motion any grounds for invalidity of contract terms – because they are contrary to public policy or a mandatory statutory provision – that are clearly apparent from the elements submitted in first instance.[1157] In a follow-up judgment, the Amsterdam Court of Appeal declared the penalty clause to be unfair. After it had given the parties the opportunity to present their views on

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1153 Case C-488/11 *Asbeek Brusse*; also discussed in subsection 3.4.2.

1154 Parts that are not challenged obtain *res judicata* effect – encompassing both formal *res judicata* ("*kracht van gewijsde*"), i.e. they are final and irrevocable, and substantive *res judicata* ("*gezag van gewijsde*"), i.e. they are binding between the parties. See further Pieter Frans Lock, 'Ambtshalve toetsing in hoger beroep: Over de omvang van het hoger beroep en het door de grieven ontsloten gebied' [2014] Tijdschrift voor Civiele Rechtspleging 45.

1155 Ancery (n 31) 134, 139.

1156 *Gerechtshof Amsterdam* 13 September 2013, ECLI:NL:GHAMS:2013:CA1825.

1157 Case C-488/11 *Asbeek Brusse*, para 45; see also subsection 3.4.2.

the contractual interest,[1158] it also declared that clause to be unfair; only the main claim was awarded, plus statutory interest. Although statutory interest had not been (explicitly) claimed, the Court of Appeal held that such a claim was implicit on the basis of the landlord's submissions in this regard.[1159]

A comparison between (the national implementation of) *Asbeek Brusse* and *Sánchez Morcillo*[1160] reveals two important differences. Firstly, under Dutch law, the grounds of appeal are not restricted to the extent that unfair terms can no longer be raised in appeal. For the question if a judicial decision can be appealed, it is irrelevant whether unfair terms control has taken place in first instance or not. In *Asbeek Brusse*, the appeal itself was admissible; the question concerned the ambit of the dispute in the concrete case. Secondly, Dutch courts of appeal can perform unfair terms control *ex officio*, because they have this power on the basis of public policy. Thus, in principle, there is redress available for a procedural breach in first instance; there is no systemic issue with the justiciability of consumer rights in appeal as such. Again, this might explain why there is no need to refer to Article 47 in this context.

Ebecek/Stichting Trudo: ambit of the dispute and role of the court in appeal

After *Asbeek Brusse*, the *Hoge Raad* confirmed in *Heesakkers/Voets* that courts of appeal are obliged to perform *ex officio* control of unfair terms falling within the ambit of the dispute.[1161] It further clarified the meaning of "ambit of the dispute" in *Ebecek/Stichting Trudo*,[1162] another case about a penalty clause in a residential tenancy agreement. The court in first instance had not found the clause to be unfair. In appeal, the tenant requested that the judgment be quashed and the claim dismissed in its entirety. The Court of Appeal 's-Hertogenbosch did not (re-)examine the alleged unfairness of the penalty clause, because no specific objection had

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1158 *Gerechtshof Amsterdam* 21 January 2014, ECLI:NL:GHAMS:2014:950.

1159 *Gerechtshof Amsterdam* 29 July 2014, ECLI:NL:GHAMS:2014:5414.

1160 Case C-169/14 *Sánchez Morcillo*; discussed in subsections 3.4.2 and 4.4.2.

1161 *Hoge Raad* 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakkers/Voets*), para 3.6.3; see also subsection 5.2.1. See also Opinion of AG Wissink of 10 April 2015, ECLI:NL:PHR:2015:455, points 3.20-3.22, followed in *Hoge Raad* 10 July 2015, ECLI:NL:HR:2015:1866, paras 3.6-3.9.

1162 *Hoge Raad* 26 February 2016, ECLI:NL:HR:2016:340, NJ 2017/214 m.nt. H.B. Krans (***Ebecek/Stichting Trudo***).

been lodged against the finding of the court in first instance; the tenant had only asked for mitigation of the penalty. The tenant brought an appeal before the *Hoge Raad* on the ground that the Court should nevertheless have performed *ex officio* control.

The *Hoge Raad* distinguished the area opened up by the appellant's objections ("*het door de grieven ontsloten gebied*") from the ambit of the dispute ("*grenzen van de rechtsstrijd*").[1163] The latter determines what the court should decide on, which is a matter of interpretation. In *Trudo*, the penalty clause was not specifically mentioned in the objections, but it was part of the ambit of the dispute: the appeal challenged the part of the judgment that granted the claim, which was based on the penalty clause at issue.[1164] This meant that this part of the judgment had not obtained *res judicata* effect and therefore fell within the ambit of the dispute. Thus, the Court of Appeal should have performed unfair terms control (*ex officio*). This is in line with later CJEU case law: what matters is whether the terms fall within the ambit of the dispute, which they do if they form the basis of the claim.[1165]

A potential problem could arise if the consumer does not contest the penalty, so the penalty clause falls outside the ambit of the dispute.[1166] This would be at odds with the need to ensure effective judicial protection, especially if in first instance no unfair terms control has taken place at all. The court's failure to do so (*ex officio*) is not a matter of the UCTD's effectiveness on a systemic level, but the incorrect application of procedural rules in a concrete case. There is a parallel with *Sánchez Morcillo* where the question arises how such a failure – or a procedural breach – can be remedied, if not by a Court of Appeal. An additional issue is that no appeal can be brought in cases where the claim does not exceed the amount of EUR 1.750.[1167]

In his Opinion on *Heesakkers/Voets*, AG Wissink had mentioned the possibility of unfair terms control in the course of enforcement proceedings, but he also observed this would be less efficient from the

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1163 Above-cited judgment of *Hoge Raad*, paras 3.4.2-3.4.3.

1164 Above-cited judgment of *Hoge Raad*, para 3.5. See also Ancery and Krans (n 1015) 138.

1165 Case C-511/17 *Lintner v UniCredit Bank Hungary*, para 44. Whether or not the terms were applied or executed in practice is irrelevant: Case C-602/13 *BBVA*, para 50; Case C-421/14 *Banco Primus*, para 73.

1166 M Nieuwenhuijs and MEA Möhring, 'Vindt de consumentenbescherming haar grens in het appelprocesrecht?' [2016] Tijdschrift voor Civiele Rechtspleging 87, 90.

1167 Article 332 Rv.

perspective of procedural economy. More importantly, it would require the consumer to actively oppose the enforcement.[1168] Another possibility could be that the consumer brings new proceedings, although this also requires the consumer to take further legal action. The case of *Banco Primus* suggests that the *res judicata* effect of the original judgment does not cover unfair terms that have not been the subject of examination by a court (yet).[1169] Otherwise, the only remedy left would be professional liability of the consumer's lawyer – if they had legal representation, which is often not the case – or State liability. As observed earlier,[1170] it is questionable whether this constitutes an effective remedy against unfair terms and/or a procedural breach; it lets the trader 'off the hook'.

5.4.2 Calls for a more tailored approach

There is another important parallel between *Asbeek Brusse* and *Sánchez Morcillo*. In both cases, consideration was given to the type of contract at issue: a tenancy agreement and a mortgage loan agreement respectively, which both pertain to housing. In *Asbeek Brusse*, the CJEU considered that "the consequences of the inequality existing between the parties are aggravated by the fact that, from an economic perspective, such a [residential tenancy] contract relates to an essential need of the consumer, namely to obtain lodging, and involves sums which most frequently, for the tenant, represent one of the most significant items in his budget, while, from a legal perspective, this is a contract which, as a general rule, is covered by complex national rules about which individuals are often poorly informed".[1171] Socio-economic factors as the right to housing also played a role in *Sánchez Morcillo* and *Kušionová*.[1172] The substantive imbalance between the parties, especially when the case concerns the family home, can be exacerbated even further by procedural inequalities. This underlined the importance of procedural guarantees and in particular equality of arms, also in appeal.

1168 Opinion of AG Wissink of 21 December 2012, ECLI:NL:PHR:2012:BY7854 (*Heesakkers/Voets*), point 3.31.

1169 Case C-421/14 *Banco Primus*; see subsection 4.4.3.

1170 See subsection 2.3.1 with reference to Case C-168/15 *Tomášová.*

1171 Case C-488/11 *Asbeek Brusse*, para 32.

1172 Case C-169/14 *Sánchez Morcillo* and C-34/13 *Kušionová*; see subsections 3.3.2 and 3.4.2.

The question arises which circumstances – such as the type of contract at issue, the significance of what is at stake (such as the family home) or whether the consumer has legal representation – are relevant for the degree to which courts should compensate for the weaker position of consumers from a procedural point of view. The court does not have to make up fully for total inertia on the part of a consumer who does not make use of available judicial remedies in a concrete case.[1173] However, it cannot always be imputed to inertia if consumers do not exercise their rights in court. For example, if the terms at issue are not found to be unfair in first instance, as was the case in *Trudo*, this could deter consumers from raising a specific objection in appeal; they might believe there is no chance of success anyway. Therefore, the fact that no specific objection is lodged is not sufficient to assume that the consumer resigns the protection offered by the UCTD.[1174] The argument that consumers have mandatory legal representation in appeal, so they are no longer (presumed to be) unaware of their rights, is not convincing either.[1175] If anything, a requirement of legal representation could be an additional procedural obstacle for consumers. Therefore, after *Trudo*, the only reason for not performing *ex officio* control that remains is in circumstances when the terms at issue are not part of the ambit of the dispute.[1176]

Calls have nevertheless been made for a more tailored approach, based on the concrete circumstances of the case.[1177] In his Opinion on *Heesakkers/Voets*, AG Wissink pointed out that the UCTD presumes there is an imbalance between the parties, but that in practice the contrast may not be as black-and-white.[1178] The position of Voets – the professional party in this case, a small enterprise – was not that different from that of a consumer. In this respect, a distinction could be made between one-shotters and repeat players; the latter have the advantage of knowledge

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1173 See subsections 3.2.2 and 3.2.3.

1174 Opinion of AG Wissink of 30 October 2015, ECLI:NL:PHR:2015:2703 (*Ebecek/Stichting Trudo*), points 3.24.2-3.25.2.

1175 Ibid, point 3.20.4. See also Case C-497/13 *Faber*, para 47.

1176 See also *Gerechtshof Den Haag* 19 September 2017, ECLI:NL:GHDHA:2017:2894 (*SEBA*), para 2.3.

1177 See e.g. Ancery and Pavillon (n 1095); Vermeulen and Schasfoort (n 1127); Biemans and Castermans (n 1010) 102–103.

1178 Opinion of AG Wissink of 21 December 2012, ECLI:NL:PHR:2012:BY7854 (*Heesakkers/Voets*), point 3.16.

and resources.[1179] Whilst the degree of inequality *in concreto* is not relevant from the perspective of the CJEU's case law, this has met with some criticism,[1180] which reveals tension between categorical protection and a case-specific proposition. The position of traders that make use of general terms and conditions should also be considered, the criticism goes, and consumers should not be given undue procedural advantages.

However, effective judicial protection of consumers is not aimed at giving them undue procedural advantages; the aim is to restore the balance. It would go too far to question the court's impartiality when it helps the consumer by applying EU consumer law and/or compensating for inequality. The court acts as a "counterweight" to ensure the application of mandatory law;[1181] this does not change the substance of the law itself, nor does it influence the court's substantive assessment.[1182] As observed earlier, there is no one-on-one relationship between the (procedural) position of one party and the (substantive) position of the other.[1183] Moreover, the trader's position must be taken into account as well. If anything, Article 47 of the Charter makes clear that the court must observe fundamental procedural guarantees for both parties, and in particular the trader's right to be heard.

5.5 RIGHT TO BE HEARD

In Dutch unfair terms cases, the right to be heard is the most visible of the procedural rights guaranteed by Article 47 of the Charter – even if it

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1179 Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95, 107. See also Judith Resnik, 'Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations' (2018) 96 North Carolina Law Review 101, 103.

1180 Alain Ancery, 'Ambtshalve toepassing van consumentenbeschermend EU-recht' [2013] Maandblad voor Vermogensrecht 329, 338–339; Vermeulen and Schasfoort (n 1127) 95.

1181 Beka (n 31) 140–141.

1182 See also ECtHR 20 December 2018, Appl. No. 22853/15 *Merkantil*, para 66.

1183 See subsection 3.5.2. For a discussion of other arguments intrinsic to Dutch civil procedure – such as the prohibition of *reformatio in peius*, which entails that appellant (the trader in this case) cannot be brought in a worse position by their own appeal – see the above-cited Opinion of AG Wissink on *Heesakkers/Voets*, point 3.25 ff. According to AG Wissink, the effective protection of consumer rights outweighs these arguments (point 3.39).

is not referred to explicitly. Before *Banif Plus Bank*,[1184] Dutch civil courts hardly made any (explicit) reference to the principle of *audi alteram partem* (*hoor en wederhoor*) in the context of the UCTD. Of course, this does not mean that this principle was not observed. On the contrary; it is one of the most fundamental principles underpinning Dutch civil procedure.[1185] It was only mid-2013 – after the judgment in *Banif Plus Bank*, which refers to Article 47 of the Charter, and *Asbeek Brusse*, which does not – that courts started explicitly referring to "*hoor en wederhoor*" for both parties, i.e. the consumer and the trader.[1186]

This was related to the implementation of the *ex officio* doctrine. In the 2014 version of the LOVCK Report,[1187] *Banif Plus Bank* was cited to emphasise that courts, when they exercise *ex officio* control, must observe the principle of *audi alteram partem*. The consumer must be given the opportunity to make a choice between annulment and preservation of the clause at issue, and the trader must be given the chance to respond and to argue why the clause is not unfair in the circumstances of the case – even if there is a suspicion that the clause is unfair because it is on the black list.[1188] The *Hoge Raad* has adopted similar reasoning in *Heesakkers/Voets*.[1189] The (implicit) impact of Article 47 on the adjudication of unfair terms cases by Dutch civil courts is thus a qualification, or finetuning, of *ex officio* control in light of the UCTD. It shows how, like in

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1184 Case C-472/11 *Banif Plus Bank*; discussed in subsection 3.5.2.

1185 Giesen (n 1040) 310. See also Ancery (n 31) 30. The principle of *audi alteram partem* is codified in Article 19 Rv.

1186 See e.g. *Rechtbank Midden-Nederland* 26 June 2013, ECLI:NL:RBMNE:2013:3393, para 3.16; *Gerechtshof 's-Hertogenbosch* 15 November 2013, ECLI:NL:GHSHE:2013:5206, para 4.3.4; *Gerechtshof Arnhem-Leeuwarden* 10 December 2013, ECLI:NL:GHARL:2013:9446, para 4.2; *Rechtbank Amsterdam* 18 December 2013, ECLI:NL:RBAMS:2013:9891, para 4.11; *Gerechtshof Amsterdam* 25 February 2014, ECLI:NL:GHAMS:2014:1580, para 3.7.3; *Rechtbank Amsterdam* 23 July 2014, ECLI:NL:RBAMS:2014:5421, para 2.5; *Gerechtshof Arnhem-Leeuwarden* 1 August 2017, ECLI:NL:GHARL:2017:6578, para 5.5.

1187 Mentioned in subsection 5.1.1; see pp. 17-18.

1188 See also 2018 LOVCK Report, pp. 22 and 42, where it is added that in default proceedings, the court can suffice with informing the claimant (trader), provided of course that consumer-defendant has been duly notified of the proceedings.

1189 *Hoge Raad* 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakkers/Voets*), para 3.9.1. See also *Gerechtshof Arnhem-Leeuwarden* 10 September 2013, ECLI:NL:GHARL:2013:6635, para 7.8 and Opinion of AG Wissink of 30 October 2015, ECLI:NL:PHR:2015:2703 (*Ebecek/Stichting Trudo*), point 3.8.1.

Spain, the generative function of Article 47 translates into national procedural law.

Like in Spain, a violation of the right to be heard is often invoked by traders in unfair terms cases when they challenge a judicial decision that is unfavourable to them. Several judgments have been called into question because the outcome arguably constitutes a "surprise decision".[1190] Such a surprise decision is often the result of a court basing its decision on information in the case file that was not part of the debate between the parties and/or the ambit of the dispute.

Usually, an alleged violation of the right to be heard can still be remedied as long as the proceedings are still pending and have not resulted in a decision with formal *res judicata* effect. For instance, in a case where the Court of Appeal found the initial claim was based on an anti-speculation clause in a deed of transfer falling within the scope of the UCTD, it ordered an oral hearing before a full bench. It held that one of the purposes of appellate proceedings is to repair any mistakes made by the court in first instance. There was no (longer a) violation of the right to be heard, because the parties did have sufficient opportunities in appeal to substantiate their position.[1191]

In this respect, it is relevant to consider at what stage of the proceedings the exchange of arguments is exactly supposed to take place. In the above-mentioned *SEBA* case, the *Hoge Raad* held that the parties must be able to express their views about the court's intended *investigation* into the applicability of the UCTD and the unfairness of the term(s) at issue.[1192] The 2018 LOVCK Report states that the parties must be heard in the case of an intended *annulment*,[1193] which suggests that this can be done after the court's provisional assessment. It is hard to see how the court could ask relevant questions at the oral hearing or allow the parties to submit additional documents, if it cannot make a provisional assessment. According to the CJEU, the principle of *audi alteram partem* as guaranteed by Article 47 of the Charter entails that:

1190 See e.g. *Gerechtshof 's-Hertogenbosch* 24 September 2013, ECLI:NL:GHSHE:2013:4346, para 11.13; Opinion of AG Wissink of 5 April 2019, ECLI:NL:PHR:2019:346, point 5.43. See also de Moor (n 1012) 234; Vermeulen and Schasfoort (n 1127) 93.

1191 *Gerechtshof Arnhem-Leeuwarden* 18 August 2015, ECLI:NL:GHARL:2015:6097, paras 3.9 and 3.12.

1192 *Hoge Raad* 29 April 2016, ECLI:NL:HR:2016:769 (*SEBA*), para 5.1.8.

1193 2018 LOVCK Report, p. 22.

> "[W]here the national court, *after* establishing, on the basis of the matters of fact and law at its disposal, or which were communicated to it following the measures of inquiry which it undertook of its own motion, that a term comes within the scope of the Directive, finds, *following* an assessment made of its own motion, that that term is unfair, it is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party".[1194] [italics added; AD]

Indeed, when a party is accused of an infringement of EU law, it must get an opportunity to respond to all the elements on which the court's decision will be based before the final *judgment* is rendered.[1195] This is in line with the CJEU's reading of Article 47 of the Charter.

It has been observed that *ex officio* control of unfair terms has a price in terms of procedural efficiency.[1196] If it only takes place in appeal, and not initially in first instance, it means the parties lose one instance and the exchange of arguments is postponed until a later stage of the proceedings. This may cause a significant delay or come at the cost of a well-considered debate between the parties. It has also been contended that Article 6 ECHR and Article 47 of the Charter prevent the court from taking a decision based on legal or factual elements that the trader was not and did not have to be prepared for.[1197] These objections show the other side of Article 47, which approaches the adjudication of unfair terms cases from a due process perspective. Effective judicial protection of both parties could be understood as the court guiding the exchange of arguments between them in a concrete and detailed manner, which facilitates the decision-making process. The right to be heard is not only a due process requirement; it also enables the court to provide justice for both by taking all circumstances of the case into account.[1198] This is reminiscent of the reconciliatory function of Article 47, which leads to a more balanced procedure.[1199] However, the question can be asked: more

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1194 Case C-472/11 *Banif Plus Bank*, para 31.

1195 See also *Gerechtshof Arnhem-Leeuwarden* 23 August 2016, ECLI:NL:GHARL:2016:6736, para 3.12 (in a non-consumer case).

1196 Vermeulen and Schasfoort (n 1127) 93. See also Ancery (n 31) 155–158.

1197 Vermeulen and Schasfoort (n 1127) 93.

1198 Pavillon (n 1012) 124. Opinion of AG Wissink of 21 December 2012, ECLI:NL:PHR:2012:BY7854 (*Heesakkers/Voets*), points 3.18 and 3.30.

1199 See subsection 4.5.3.

balanced for whom?[1200] Chapter 4 shows how Article 47 may be used to defend traditional principles of civil procedure, without properly considering how they prevent courts from restoring the balance for consumers or otherwise affect the effective judicial protection of individual consumer rights. Courts should therefore beware of how and why Article 47 is being invoked, by whom and to what end.

5.6 INTERIM CONCLUSION: THE ROLE OF ARTICLE 47 IN DUTCH CASE LAW

Dutch civil courts rarely refer to Article 47 of the Charter. In the context of the UCTD, procedural issues are dealt with almost exclusively in the framework of *ex officio* control. In the Netherlands, the CJEU's case law has been implemented mostly through judge-made law, i.e. consistent interpretation of (open) norms and a consumer-friendly application of procedural rules that determine the powers of the court, in particular in default and appellate proceedings (see e.g. *Trudo*) and judicial review of arbitral awards (*StAR* case). In general, unfair terms cases are not constitutionalised. The only references to Article 47 were made in respect of arbitration clauses in consumer contracts before they were blacklisted, and (more implictly) the right to be heard.

In *Van Marrum/Wolff*, Article 47 was one of the parameters in the substantive unfairness assessment of an arbitration clause, which could be seen as an instance of its eliminatory function – but only horizontally, i.e. in the contractual relationship between the parties. It could also be perceived as a signal to the legislature that arbitration clauses should be included in the black list of unfair terms. Dutch civil courts have not (yet) engaged in legality review on the basis of Article 47. Whereas they strive for a unified approach towards *ex officio* control, they do not seem to recognise the different rationale of effective judicial protection as an EU fundamental right. This could be due to several factors. Perhaps there really is no need for them to do so, perhaps they are reluctant because of the lack of a constitutional tradition, or perhaps they do not see the (added) value of Article 47 vis-à-vis Article 6 ECHR, as e.g. the *StAR* case suggests. In that respect, they tend to overlook that the link between

[1200] As Kennedy has observed, rights arguments may mediate between law and policy where they explain and justify rules, but their supposedly objective character may also reduce rights arguments to a question of balancing: Kennedy (n 367) 320.

substantive and procedural protection of consumers under the UCTD might warrant a higher level of protection, or at least extra scrutiny on the part of the court. In this respect, Article 47 of the Charter could fulfil an empowering function.

The notion of effective judicial protection has persuasive authority: courts use it as an argument to give an expansive interpretation of legislative provisions, especially when norms with a protective purpose are concerned. In so far as a reference to Article 47 shows awareness of the fundamental rights at stake, it could fulfil a rhetorical function where it provides a reason for going beyond what a strict application of the law would otherwise require. In addition, it might reveal a focus on the need to ensure due process in a concrete case. This gets obscured by an exclusive emphasis on *ex officio* control. There is nevertheless a danger of Article 47 being turned into an argument to curtail the effective judicial protection of individual consumer rights, which courts should beware of. Moreover, a case-by-case approach may conceal the need to restore structural imbalances in the civil justice system and, in particular, potentially problematic aspects of litigation against consumer-defendants. Procedural protection is not entirely trans-substantive, which is exactly what makes Article 47 of the Charter stand out – something that Dutch civil courts do not seem to (fully) acknowledge.