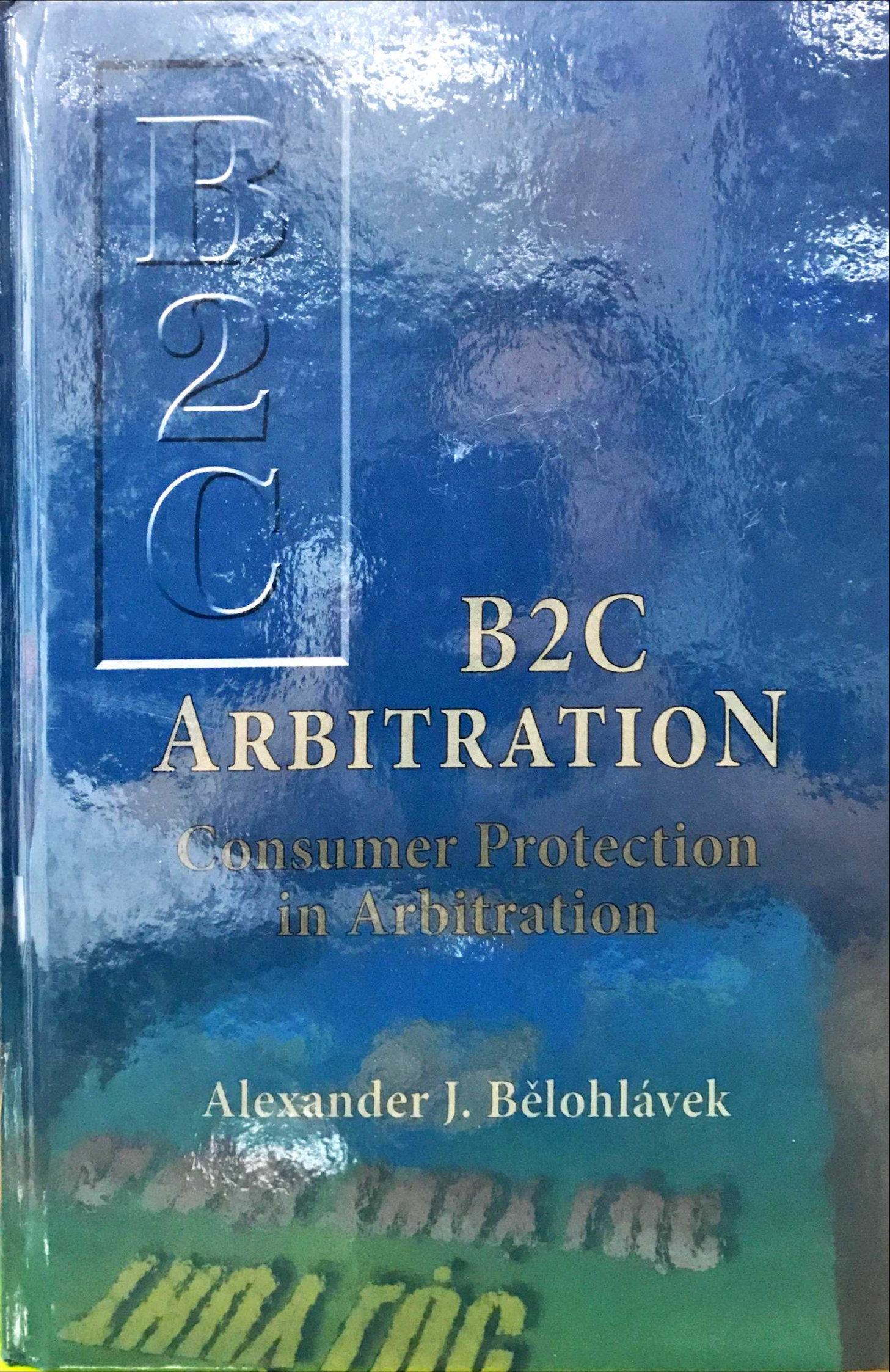
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ARBITRATION
Consumer Protection
in Arbitration
Alexander J. Bělohlávek

B2C Arbitration:
Consumer Protection in Arbitration

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CONTENTS

I. Introduction

I.1. Subject of this publication

1. This book analyzes the interaction between the power exercised by public authorities (primarily in court proceedings) and the power of arbitration in the resolution of consumer disputes. It also focuses on the different arbitration regimes in consumer cases and analyzes certain issues related to their harmonization and the importance of their unification. It is necessary to emphasize that there are fundamental, albeit only apparently latent differences between the individual national laws.

2. The primary concentration is on the generalization of the country specific or regional models and, thus conversely, the importance of national laws, or even the rules adopted by certain permanent or other arbitral institutions was suppressed. No differences were made between domestic and international arbitration.

3. The mutual relationship between arbitration and consumer protection laws is also discussed with respect to the conflict between the perspective of the courts and the perspective of arbitrators and arbitration.

I.2. Different national approaches and experience in the resolution of consumer disputes

4. Arbitration is usually classified as one of several alternative dispute resolution methods (ADR),[1] i.e. as different from litigation in courts. The other alternatives, apart from arbitration, may include mediation or mediation connected with arbitration, expert proceedings,[2] assisted conciliation, and procedures which could be labeled as arbitration but lack some of its features, such as voluntariness, the right to appoint an arbitrator, etc. Some of these procedures include online dispute resolution similar to mediation or government-promoted consumer dispute resolution regimes, such as those in Spain [ESP] or Portugal [PRT]. The United Kingdom [GBR] has adopted a specific consumer

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[1] Several passages will analyze the difference between common law and civil law; common law (as opposed to continental schools) classifies arbitration as one of the ADR methods. Conversely, civil law is closer to the jurisdictional (but mostly hybrid) approach, and it therefore separates arbitration from ADR as a special method of finding the law and resolving disputes.

[2] Cf. *Bělohlávek, A. et Hótová, R.* Znalci v mezinárodním prostředí (v soudním řízení civilním a trestním, v rozhodčím řízení a v investičních sporech). [Title in translation: Experts in the International Environment (in Civil and Criminal Court Proceedings, Arbitration and Investment Disputes)]. Prague: C. H. Beck, 2011 (also available in Polish – Warsaw: C. H. Beck, 2011, in Russian – Kiev: Taxon, 2011 and in Romanian – Bucharest: C. H. Beck, 2012).

dispute resolution system according to which all disputes from consumer credits are obligatorily resolved by the Financial Ombudsman in compliance with the Consumer Credit Act [GBR] (1974).[3] The formal aspects of these proceedings are significantly different from arbitration. The outcomes of these procedures (however authoritative the decision) cannot be enforced in international relations even under the *New York Convention*.

I.3. Positive and negative aspects of litigation and arbitration in consumer disputes, fair trial, and efficiency of dispute resolution

5. Arbitration is not a cure-all and is definitely not a method suitable for the resolution of every dispute. It has its proponents as well as opponents. Indeed, one would be hard put to claim that a particular type (class) of disputes is *a priori* fit to be resolved in arbitration, rather than through litigation, or vice versa. The same could be said of consumer disputes (disputes arising from consumer contracts). That consumers deserve some specific protection in cases where they are forced to enter into a particular contract and have no other option but to accept the conditions stipulated by the other party (the professional) is fairly indisputable. But neither can one principally claim that the resolution of these disputes in court would be more suitable than arbitration or any other alternative dispute resolution (ADR) method. The individual states, as well as the entire international community, realize with an ever increasing awareness that litigation is often unable to offer effective legal protection. Take as an example Germany [DEU]. The ECtHR has repeatedly held that the unreasonable length and procedural complexity of judicial proceedings have breached the right to a fair trial in a number of countries. Germany was the usual culprit, but on more than one occasion, similar complaints have been filed against other countries, too. Indeed, it was a series of complaints against Germany [DEU] which actually resulted in a resolution delivered by the Grand Chamber of the ECtHR—in which *Sümerli* v. *Germany* [DEU][4] was used as a model

[3] Consumer Credit Act (1974), as amended in 2006 – Consumer Credit Act (2006). The current version of the Consumer Credit Act (1974) is available at: http://www.legislation.gov.uk/ukpga/1974/39/contents#485933 [last access 14 January 2012]. Amendments implemented in 2006 are also analyzed at the website of the Office of Fair Trading at: http://www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/CCA2006/ [last access 14 January 2012].

[4] Decision of the ECtHR, Case No. 75.529/01 of 8 June 2006 (*Sümerli* v. *Germany*). Indeed, German constitutional law fully adheres to the principle of the right to a speedy trial before an independent and impartial tribunal; this right is even explicitly incorporated in the constitutions of some of the federal states (for instance, Article 51(4) of the Brandenburg Constitution [DEU], etc.). Cf. the Council of Europe, the Venice Commission. Can Excessive Length of Proceedings be Remedied? (Science and Technique of Democracy), 2007, p. 164. This publication issued by the CoE contains a detailed analysis with national reports filed by the Member States of the ECHR. It is easy to see that most countries suffer from excessive length of proceedings, procedural obstacles, and other problems

case—and which even ruled that contemporary German procedural law does not safeguard effective instruments[5] for the protection of rights enshrined in the *European Convention* on Human Rights (ECHR). *Sümerli* v. *Germany* [DEU] (and other similar complaints filed with the ECtHR against various states) is notorious in many countries for the relationship between the factual and legal findings, but also for the procedural complications and delays, the repeated remanding of cases for a new trial in a lower court, delays in the drafting of expert appraisals and their discussion in court—all of which contributed to the fact that a basically simple dispute took many years to settle. The promotion of arbitration and alternative dispute resolution (ADR)[6] is therefore a logical solution.[7] On the other hand, as a method for finding the law and resolving disputes it entails many risks. Despite the existing role of the court (support and supervision), the decisions are rendered by private-law entities, i.e. outside the absolute control exercised by public authorities. The potential risks are therefore obvious. However, the just protection of the weaker parties in contractual relationships is not the only criterion; it is also in the *public interest* that such protection be effective, efficient, and expeditious. The present work focuses, inter alia, on the mutual contradictions [between these public and the private interests] from the perspective of consumer protection and arbitration. Naturally, it would be impossible to analyze their every aspect, but the attempt is here made to define and examine some of the most important.

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with the enforcement of rights in courts. These excesses are often repeated and extreme; what is even worse, these problems occur more and more frequently and the proceedings in developed countries with traditional democracy and a mature judiciary and infrastructure are taking longer and longer.

[5] As concerns this issue, see an interesting article by *Hájek, O.* Winning your case is good, effective remedy is better! Recognition of Foreign Judgments and Arbitral Awards in the Czech Republic. Common Law Review, 2008, No. 8.

[6] It is necessary to emphasize that the conceptual approach to ADR differs depending on the individual legal culture. While most jurisdictions based on common law principles classify arbitration among alternative dispute resolution methods (ADR), most civil law countries perceive arbitration as separate from ADR. This highlights the fact that arbitration is an alternative to litigation, as concerns both the nature, and especially the outcome of the proceedings. Arbitral awards are mostly equaled with court judgments. This is not to say that common law would not often arrive at the same conclusion. But the doctrinal reasons behind the solution are different. The reason is that the common law regime (depending on the individual country) is based on the presumption that even the judiciary (the exercise of judicial authority by courts as public authorities) has a contractual basis, similar to the exercise of any other public authority. Conversely, most civil law countries are more inclined towards the assumption that the power exercised by public authorities is derived from state sovereignty as an immanent component of the "state," both under international law and from the perspective of national (domestic) law.

[7] *Bělohlávek, A.* Arbitration from the Perspective of the Right to Legal Protection and the Right to Court Proceedings (the Right to have One's Case Dealt with by a Court): Significance of Autonomy and Scope of the Right to a Fair Trial. In: *Bělohlávek, A. et Rozehnalová, N.* CYArb - Czech (& Central European) Yearbook of Arbitration: The Relationship between Constitutional Values, Human Rights and Arbitration, Huntington (New York): JurisNet, 2011, Vol. I, pp. 47–70, here p. 47–49.