

Arbitration - Austria

Supreme Court defines consumer protection laws applicable to arbitration

Contributed by **Graf & Pitkowitz**

May 22 2014

Facts
Analysis
Comment

In a December 16 2013 decision⁽¹⁾ the Supreme Court ruled, for the first time, on the applicability of certain consumer protection laws in the context of corporate disputes, and clarified the applicable law for assessing the capacity of a consumer when a foreign legal entity is involved.

Facts

The dispute arose out of a joint venture agreement for Bulgarian fruit juice. Under the joint venture contract, all disputes were to be resolved by International Chamber of Commerce (ICC) arbitration seated in Vienna, Austria.

The two respondents in the arbitration disputed the jurisdiction of the arbitral tribunal on the basis that they should be considered consumers. The first respondent had initially held 82.51% of the operative company's shares. When the joint venture contract ended, it indirectly – through the second defendant (a Liechtenstein foundation) – held 100% of the shares.

The arbitral tribunal confirmed its jurisdiction over both respondents and issued an award on the merits in favour of the claimant. In the subsequent challenge proceedings commenced by the respondents, the Supreme Court reviewed the jurisdictional challenge.

The two respondents requested that the award be set aside, arguing that the arbitration agreement was invalid pursuant to Section 617(1) of the Code of Civil Procedure as they were consumers, which they alleged must be assessed in light of the Consumer Protection Act. The claimant objected, arguing that:

- the Consumer Protection Act does not apply to non-Austrian parties;
- even if it was applicable, they were entrepreneurs, not consumers; and
- the consumer protection rules of the Code of Civil Procedure are inapplicable to corporate disputes.

The Supreme Court ultimately upheld the arbitral award, but broadly applied the consumer protection laws.

Analysis

For the first time, Supreme Court assessed two extensively debated legal issues regarding consumers and arbitration.

The first issue was whether Section 617(1) of the Code of Civil Procedure – which sets out specific consumer protection rules for arbitration – is applicable to corporate disputes in general. The second issue dealt with the relevant law for assessing a foreign entity's capacity as a consumer.

Applicability of Code of Civil Procedure

According to Section 617(1) of the Code of Civil Procedure, an arbitration agreement between entrepreneurs and consumers can be concluded effectively only after the dispute has arisen. The provision does not limit the objective arbitrability, but must be qualified as a condition within the arbitration agreement in order for it to be a valid agreement. Before this case, the Supreme Court had not ruled on the applicability of Section 617 to corporate disputes, but legal scholars⁽²⁾ have debated the subject extensively. The Supreme Court discussed the various arguments raised and held that

Author

Nikolaus Pitkowitz



Section 617 governs any arbitration proceedings seated in Austria, with no differentiation between international and national arbitration or the party's origin.

In addition, the court rejected the scholarly arguments in favour of limiting the scope of Section 617. Even if the imbalance between enterprises and consumers was not as highly developed in corporate law (which the court generally doubted), the court held that this would not justify a limitation. In the court's view, the possible invalidity of the arbitration agreement did not constitute a disadvantage that needed to be compensated for by reducing the scope of the consumer protection laws because the consumer had the opportunity to agree on arbitration after the dispute arose. Furthermore, the court rejected the argument that corporate law already has sufficient protective measures since it contains no procedural protection similar to Section 617.

Applicable law to assess capacity of consumer

The Supreme Court also discussed the applicable law to assess a foreign entity's capacity as a consumer. The court decided to apply Austrian law generally and, therefore, the definition of 'consumer', as outlined in the Consumer Protection Act, if the arbitration is seated in Austria. The court argued that Section 617(1) of the Code of Civil Procedure should qualify as a condition for the validity of the arbitration agreement, which corresponds with Article 5(1)(a) of the New York Convention, pursuant to which the validity of an arbitration agreement must be considered under the applicable law at the seat of arbitration.

The court noted that, according to the prevailing view, the term 'consumer' should have the same meaning in both the Code of Civil Procedure and the Consumer Protection Act. Following this definition, a 'consumer' is anyone who is not an entrepreneur (as defined in Section 1(2) of the Consumer Protection Act) and therefore anyone for whom a legal transaction falls outside the scope of her or his business. Under Austrian law, legal entities can also be consumers. Whether a shareholder is considered a consumer or an entrepreneur is assessed through an economic approach. A crucial issue is the alignment of shareholder and company interests and whether the respective shareholder pursues its own business activities. Another important factor is the extent to which the shareholder influences the management of the company. If a shareholder holds more than 50% of the company's shares, it is assumed to have significant influence.

In this case, the court held that because the first respondent indirectly held 100% of company's shares when the joint venture contract ended, it thus controlled the operative company and was not a consumer.

With regard to the Liechtenstein foundation, the Supreme Court held that generally even a legal entity can be a consumer. However, it relied on Section 2 of the Commercial Code, pursuant to which certain legal entities explicitly listed in this provision must be treated as entrepreneurs by law. The court held that if a foreign legal entity remotely corresponds to one of these types – as was the case for the second respondent – it must be also treated by analogy as an entrepreneur.

Therefore, the Supreme Court rejected the claimants' claim that they should be seen as consumers.

Comment

The consumer protection clause applicable to arbitration essentially exempts consumers from arbitration since, among others things, it stipulates that arbitration agreements may be validly concluded only after a dispute has arisen. Numerous scholars have developed arguments in favour of restricting the application of the clause in a corporate context and have even attempted to find arguments to exclude its application entirely. The Supreme Court's decision now puts an end to this ongoing debate. The decision makes clear that the Supreme Court will side with consumers in such cases. However, the Supreme Court's arguments are not entirely convincing. Above all, arguably it is doubtful that there is a need to 'protect' everyone from arbitration – especially in an international situation where arbitration may be the only means to obtain an enforceable remedy. Ultimately, however, the Supreme Court could not entirely remove the language of the Austrian law. It will therefore be the legislature's task – in a process already initiated – to alter the law and clarify that broad Austrian consumer protection will not apply to such situations. Until that clarification has been enacted, parties concluding arbitration agreements with a seat in Austria should be diligent in cases where a possible consumer may be involved. In corporate matters, this is particularly important in cases where a shareholder is a natural person who cannot exercise a decisive influence on the management of the company.

One aspect of the decision is positive: while the consumer protection law theoretically also encompasses legal entities, the broad analogy drawn by the Supreme Court with regard to Austrian corporations should in fact exempt usual cases involving non-Austrian corporations (eg, limited liability companies, stock corporations and private foundations) from the danger of being qualified as a consumer.

For further information on this topic please contact [Nikolaus Pitkowitz](#) at [Graf & Pitkowitz](#)

by telephone (+43 1 401 17 0), fax (+43 1 401 17 40) or email (pitkowitz@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.

Endnotes

(1) Docket 6 Ob 43/13m.

(2) Demetz, Hausmaninger, Kraus, Nueber, Oehlberger, F Schumacher Steinhofer, E Oberhammer, Pitkowitz, Rainer, Riegler, Schifferl, Stippl, Terlitza and Weber.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2014 Globe Business Publishing Ltd