

Austrian Supreme Court sets delimiters for consumer rights in arbitration

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NIKOLAUS
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In a recent decision,⁽¹⁾ the Supreme Court had to assess its jurisdiction in light of a consumer protection provision that provided for proceedings for the annulment of arbitral awards over three levels of legal proceeding, instead of the usual one-instance proceeding at the Supreme Court. The Court took this as an opportunity to express a restricted position on consumer rights in connection with arbitration agreements and the annulment of arbitral awards.

Facts

The beneficiary of a private foundation commenced an ad hoc arbitration against the private foundation based on its articles of association. The ad hoc arbitral tribunal found that it did not have jurisdiction. The beneficiary subsequently requested the Supreme Court to annul the arbitral tribunal's jurisdictional decision.

Decision

Before deciding on the subject matter, the Supreme Court had to assess its own jurisdiction in light of section 617 of the Code of Civil Procedure (ZPO). This provision applies to arbitrations that involve a consumer; it limits the consumer's ability to conclude an arbitration agreement where the consumer is confronted with an entrepreneur and thus there is an imbalance of powers. Further, deviating from the Supreme Court's general jurisdiction for annulment proceedings, section 617(8) of the ZPO allows annulment proceedings of arbitral awards to run over all three levels of the Austrian court system, with the regional courts having jurisdiction in the first instance.

The Supreme Court held that this provision is not applicable when a beneficiary of a private foundation asserts claims against the private foundation itself. It referred to the legislative materials⁽²⁾ on section 617 of the ZPO, according to which the "typical subordination constellation" of the entrepreneur-consumer relationship needs to be present for the application of section 617(8) of the ZPO. However, in the Supreme Court's opinion, such an imbalance between the parties was not present in the case at hand. Hence, the three levels for legal proceedings for the avoidance of arbitral awards set out in section 617(8) of the ZPO did not apply and the Supreme Court was competent to rule on the claimant's application.

Comment

Under Austrian law, consumer-related disputes can also be resolved by way of arbitration. However, to protect consumers, the ZPO restricts arbitration agreements and proceedings, with a number of mandatory provisions set out in section 617 of the ZPO. These protective provisions generally apply to all arbitration proceedings where the seat of the arbitral tribunal is Austria.

Section 617 ZPO

The regime of section 617 of the ZPO regulates the following two stages:

- As soon as a consumer is involved in an arbitration agreement, irrespective of whether the other contracting party is a consumer or an entrepreneur:
 - a separate arbitration agreement must be concluded (paragraph 2);
 - annulment proceedings run over all three levels of the Austrian court system (paragraph 8); and
 - the grounds for annulment are broader, including the violation of mandatory provisions below the public policy level and new evidence coming up after the issuance of the award (paragraph 6).
- If the consumer is confronted with an entrepreneur, and thus there is an imbalance of powers, a number of additional requirements must be complied with, making it practically impossible to effectively bind consumers to arbitration. This "stage 2" consumer protection includes the requirement that:
 - arbitration agreements must be concluded only once the dispute has arisen (paragraph 1);
 - arbitration agreements must contain legal instructions (paragraph 3);
 - the seat of arbitration must be determined in the arbitration agreement, and then be maintained (paragraph 4); and
 - restrictions to include consumers not domiciled at the seat of arbitration (paragraph 5).

Against this background, it seems remarkable that the Supreme Court accepted its jurisdiction on the grounds of non-application of section 617(8) of the ZPO not by referring to the absence of a consumer (as the legislative text and the legislative materials would suggest), but by pointing out that the "typical subordination constellation" of the entrepreneur-consumer relationship did not exist between the claimant and the respondent in the present case. While the consideration of imbalances between the parties stems from the legislative materials regarding section 617(8), these also clearly state that any consumer involvement – irrespective of its counterparty – shall suffice. It remains unclear whether, in the case at hand, the Supreme Court explicitly required not only the presence of a consumer, but also the presence of an entrepreneur as counterparty, or whether the Supreme Court's reasoning was unintentionally ambiguous. In any event, the conclusion drawn led to the Supreme Court confirming its jurisdiction

Consumers

This case also highlights another issue in connection with arbitration and consumers: the correct classification of a party as consumer. In the present case, the Supreme Court left the question open whether the beneficiary of a private foundation is to be classified as a consumer since the Supreme Court did not assess the requirements for "stage 1" consumer protection. For the purposes of the ZPO, a consumer is a person for which the matter is not part of its business activities. "Business activities" include any ancillary business activities and does not depend on a certain company size or organisational structure. A "consumer" is not limited to natural persons, but may also be a legal entity. Each case needs to be assessed individually, applying Austrian law.⁽³⁾

Conclusion

The Austrian legislature is currently reviewing Austrian law provisions that grant consumers special rights in arbitrations, as they are apparently overreaching, especially because they can pose difficulties in corporate disputes which involve (non-controlling) shareholders that could be qualified as consumers.

Despite its ambiguity as to whether, in addition to the involvement of a consumer, the consumer's counterparty also needs to be an entrepreneur for the application of "stage 2" consumer protection, the decision at hand provides a helpful clarification as to the definition of the subordination relationship that triggers the "stage 2" consumer protection. It clarifies that in a scenario where a dispute arises between a private foundation and one of its beneficiaries, there is no imbalance of powers, thus the strict consumer protection provisions of "stage 2" will not apply.

Furthermore, the decision demonstrates the generally arbitration-friendly approach of the Supreme Court, as it ultimately confirmed its jurisdiction by surmounting the hurdles of consumer protection.

For further information on this topic please contact [Nikolaus Pitkowitz](mailto:n.pitkowitz@pitkowitz.com) at Pitkowitz & Partners by telephone (+43 1 413 01 0) or email (n.pitkowitz@pitkowitz.com). The Pitkowitz & Partners website can be accessed at www.pitkowitz.com.

Endnotes

- (1) Supreme Court, 14 April 2021, Docket 18 OCg 1/21b.
- (2) Legislative materials to the arbitration law amendment act of 2013, 2322 BlgNR 24 GP 4.
- (3) Supreme Court, 16 December 2013, Docket 6 Ob 43/13m.