



Supreme Court analyses conflicting forum selection clauses

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Introduction

The Supreme Court recently assessed a case where the parties had agreed two conflicting forum selection clauses within the same contract:

- an arbitration agreement; and
- a jurisdiction clause in favour of a state court seated in Russia.⁽¹⁾

However, when a dispute arose, the claimant argued that as a result of the conflict, there was no valid agreement and brought its action in a third forum – an Austrian state court, the seat of the defendant and the competent forum according to Austrian statutory law.

In its 20 January 2021 decision, the Supreme Court set out the principles relevant in dealing with colliding forum clauses and their relation to statutory law.

Facts

The claimant sought a declaratory judgment that a purchase agreement concluded with the defendant in 2015 was null and void and requested repayment of the partial purchase price already paid.

The purchase agreement contained two forum clauses:

- an arbitration clause in favour of arbitration seated in Vienna; and
- a jurisdiction clause relating to a state court in Moscow.

None of the clauses stated that they were exclusive. However, the claimant chose neither arbitration nor the Moscow state court and instead brought its action at the seat of the defendant in Austria pursuant to statutory law.

First and second-instance decisions

The Austrian first and second-instance courts dismissed the claimant's action due to a lack of subject matter jurisdiction. The courts held that the arbitration agreement and the jurisdiction clause could

coexist because neither had been drafted in an exclusive manner. The claimant had the right to choose between the two contractually agreed forums but could not resort to statutory law.

The first and second-instance courts declined jurisdiction because of the parties' valid agreement to settle disputes either by arbitration or in front of a Moscow state court. The courts also held that an arbitration agreement must be given effect *ex officio* (without a request from a party) when assessing jurisdiction.

The claimant brought an extraordinary appeal to the Austrian Supreme Court, which objected to the legal view expressed by the first and second-instance courts.

Issue

The claimant argued that the parties' intention could not be established; thus, only the wording of the purchase agreement was relevant. The claimant opined that due to the contradictory wording of the arbitration agreement and jurisdiction clause, both had to be held invalid. To further highlight this contradiction, the claimant also noted that – consistent with the conflicting forum clauses – the parties had also agreed two contradictory applicable laws: Austrian and Russian. As a result of the invalidity of both forum clauses, the claimant proposed that jurisdiction for its action was subject to statutory rules.

Supreme Court decision

The Supreme Court invoked established case law according to which, in cases of conflict between a jurisdiction clause and an arbitration agreement in the same document, both clauses can effectively coexist unless the agreement contemplates the exclusive jurisdiction of state courts despite an arbitration clause. Since in this case neither clause had been drafted as exclusive, there was no contradictory wording in the contract. Thus, both clauses were held to be valid. The fact that the parties had agreed the application of different substantive laws in corresponding provisions to the jurisdiction clauses was not considered relevant to support the claimant's argument. After all, multiple governing laws may apply alternatively or cumulatively to the same question or facts. For example, parties can agree that the substantive law at the venue of a dispute will apply.

The Supreme Court has constantly ruled that an existing and valid arbitration agreement generally leads to a lack of subject matter jurisdiction of state courts. However, such lack of subject matter jurisdiction is not automatically a consequence of an arbitration agreement because an arbitration agreement can also provide for the non-exclusive jurisdiction of the arbitral tribunal, which gives parties the opportunity to agree on additional forums. Such an agreement gives claimants the right to choose, as was the case in this litigation, between the two forums contractually agreed.

Further, the Supreme Court confirmed that if a valid arbitration agreement exists, it must be given effect *ex officio* by a state court. As a result, the Supreme Court held that the first and second-instance decisions were correct.

Comment

In practice, conflicting forum selection clauses providing for the jurisdiction of state courts on the one hand and arbitral tribunals on the other hand are regularly contained in one contract. When in doubt,

Austrian case law generally tends to construe contracts in a way that gives effect to the arbitration agreement. Consequently, it is established case law that conflicting forum clauses do not lead to the invalidity of the arbitration agreement if the jurisdiction clause does not provide for the exclusive jurisdiction of state courts. In such cases, both forum selection clauses have a justification to co-exist and the contract is not contradictory in this regard.

Further, where an arbitration agreement does not provide for the exclusive jurisdiction of an arbitral tribunal, it is usually construed as an optional arbitration agreement, next to which additional (non-exclusive) forum clauses are permitted. Such a flexible approach can be useful in practice where claimants may, for example, choose to resort to state courts for minor disputes and arbitration for major or confidential issues. While it seems to be an elegant solution to deal with conflicting forum selection clauses, it should be kept in mind that such an approach is available only in cases where neither forum clause expressly provides for exclusive jurisdiction.

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Endnotes

(1) Supreme Court, 20 January 2021, Docket 3 Ob 127/20b.