

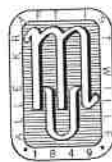
# Austrian Yearbook on International Arbitration 2016

The Editors

**Christian Klausegger, Peter Klein, Florian Kremslehner,  
Alexander Petsche, Nikolaus Pitkowitz, Jenny Power,  
Irene Welser, Gerold Zeiler**

The Authors

John Beechey, Andrea K. Bjorklund, N. Jansen Calamita, Gabriele Ehlich,  
Constantin Eschlboeck, Gustav Flecke-Giammarco, Alice Fremuth-Wolf,  
Ulrike Gantenberg, Lucy Greenwood, Anne-Karin Grill, Dieter Hofmann,  
Boris Kasolowsky, Christian Klausegger, Pascale Koester, Ruth Mahfoozpour,  
Michael McIlwrath, Georg Naegeli, Amanda Neil, Veit Öhlberger,  
Tamsyn Pickford, Jarred Pinkston, Peter Rees, Nicolas W. Reithner,  
Catherine A. Rogers, Markus Schifferl, Alfred Siwy, Alexandra Stoffl,  
Michael Swangard, Ema Vidak-Gojkovic, Simon Vorburger, Irene Welser,  
Venus Valentina Wong, Ewa Zelazna



Wien 2016

MANZ'sche Verlags- und Universitätsbuchhandlung  
Verlag C.H. Beck, München  
Stämpfli Verlag, Bern

# Consumer Protection in Arbitration Proceedings in Liechtenstein

## Austrian and Liechtenstein Consumer Protection in Arbitration Proceedings – Differences and Similarities

Nicolas W. Reithner/Gabriele Ehlich

### I. Introduction

Whereas Austria has had a Consumer Protection Act since 1979, the Liechtenstein Consumer Protection Act (*Liechtensteinisches Konsumentenschutzgesetz* – LCPA) was not introduced until 2002. Prior to this, there was a rather sparse series of legal consumer protection provisions, and they were scattered over various laws. Particularly after Liechtenstein joined the EEA, a number of consumer protection guidelines had to be implemented.<sup>1)</sup> Furthermore, Liechtenstein has set itself the goal of raising its profile in the future on the international stage when it comes to arbitration.<sup>2)</sup> Hence, in 2010, the Liechtenstein Code of Civil Procedure (*Liechtensteinische Zivilprozessordnung* – LCCP), which had always drawn on the legislative provisions enacted into the Austrian Code of Civil Procedure (*Österreichische Zivilprozessordnung* – ACCP), was revised.

This paper investigates the enactment of the LCPA and of arbitration norms in the LCCP, as well as the further development of, and the differences between, the legal situation in Austria and Liechtenstein with regard to consumer protection in arbitration law.

### II. General Overview of Consumer Protection

As the Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – CC) had already been adopted from Austria in 1811, it was deemed appropriate, given the close links between the Austrian Consumer Protection Act (*Österreichisches Konsumentenschutzgesetz* – ACPA) and the CC, to position consumer protection toward Austrian law, too. This resulted in the almost complete adoption of the then cur-

<sup>1)</sup> BuA (Bericht und Antrag = [Government] Report and Proposal) 2002/74, available at [www.bua.llv.li](http://www.bua.llv.li).

<sup>2)</sup> BuA 151/2008, 6, BuA 47/2011, 5.

rent version of the ACPA in 2002. While the ACPA has since been the subject of several substantial amendments, the original version of the LCPA has remained almost untouched.

To date, there has been no published case law on the subject of consumer protection in Liechtenstein. Liechtenstein is just a tiny jurisdiction with little case law outside its strong corporate law and financial industry. But in general, recourse is made to the doctrine and case law of the country whose laws were adopted, *in concreto* to Austrian law.<sup>3)</sup>

As already mentioned, the ACPA has been amended more than a dozen times since the entry into force of the LCPA in 2002. Liechtenstein adopted none of these amendments. Either there was no need to regulate certain subjects in Liechtenstein<sup>4)</sup> or the underlying EU directives were implemented in Austria by amending the ACPA, whereas Liechtenstein enacted a separate law,<sup>5)</sup> or the rules were integrated into special laws.<sup>6)</sup>

### III. Consumer Protection in Arbitration Law

In the field of arbitration law, Liechtenstein knows certain consumer protection provisions. Up to 2013, Liechtenstein was not a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention"), and the arbitration rules of the LCCP dated back to the 1980s. The declared intention of reforming these rules was to establish Liechtenstein as an international arbitration location and to increase its appeal.<sup>7)</sup> To achieve this objective, attention focused on updating Liechtenstein arbitration law started in 2008,<sup>8)</sup> and the LCCP was amended in 2010 on the basis of the 2006 Austrian Arbitration Amendment Act (*Schiedsrechts-Änderungsgesetz*

<sup>3)</sup> Established principle to use foreign case law; see most recently: Supreme Court GE 2011, 1 and Constitutional Court Decision 2013/053 (GE 2014, 411). "GE" = Liechtenstein case law database.

<sup>4)</sup> E.g. work-at-home contracts, Sections 27 (b-i) ACPA.

<sup>5)</sup> E.g. distance sales: in Liechtenstein from the outset the Distance Selling Act (*Fernabsatzgesetz*); in Austria initially regulated in the ACPA, later through the Act on Off-Premises and Distance Contracts (*Fern- und Auswärtsgeschäfte-Gesetz*).

<sup>6)</sup> E.g. Consumer Credit Act (*Konsumkreditgesetz*) (Liechtenstein National Law Gazette [*Liechtensteinisches Landesgesetzblatt* - LNLG] 2012 No. 1), Timesharing Act (*Teilnutzungsgesetz*) (LNLG 2012 No. 178), Distance Financial Services Act (*Fern-Finanzdienstleistungs-Gesetz*) (LNLG 2005 No. 36), Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) (LNLG 1992 No. 121), Payment Services Act (*Zahlungsdienstegesetz*) (LNLG 2009 No. 271).

<sup>7)</sup> Moritz Blasy & Nicolas W. Reithner, *Die Auswirkungen des neuen § 634 ZPO in Liechtenstein*, in *DER GENERATIONENWECHSEL IN DER STIFTUNGSLANDSCHAFT* 137 ff (F. A. Schurr ed., 2012).

<sup>8)</sup> BuA 2008/151.

2006–2006 AAAA). Furthermore, Liechtenstein signed and ratified the New York Convention in 2013.<sup>9)</sup>

The Austrian provisions were slightly adjusted to meet the requirements of Liechtenstein. For instance, some improvements were included, like the shortening of the challenge procedure (*cf.* Section 632 LCCP)<sup>10)</sup> and additional confidentiality provisions for that procedure (*cf.* Section 633 [2–4] LCCP)<sup>11)</sup>.

The special provision on arbitration agreements between companies and consumers is to be found in Section 634 LCCP and corresponds to Section 617 (1–7) ACCP. The latter provision has already been criticized on several occasions in Austria.<sup>12)</sup> One of the authors has voiced his criticism of the Liechtenstein counterpart, too.<sup>13)</sup> As outlined further on, a pertinent reform is imminent in Liechtenstein.

## IV. Consumer Protection in Company Law

### A. Is a Legal Entity under Private Law an Entrepreneur or a Consumer?

Both Section 1 (1) (1) ACPA and Section 1 (1) LCPA stipulate that public legal entities are always deemed to be entrepreneurs. As *argumentum e contrario* it can, therefore, be deduced that private legal entities are not *always* to be classified as entrepreneurs. A subject of major debate in Austria is whether specific legal entities like associations or foundations are entrepreneurs or consumers.

#### 1. Legal Situation in Austria

To the extent that a private legal entity operates a business as defined in Section 1 (2) ACPA, its entrepreneurial character is not up for debate.<sup>14)</sup> Furthermore, some legal entities are entrepreneurs by virtue of their legal form (e.g. joint-stock company [*Aktiengesellschaft* – AG] or company with limited liability [*Gesellschaft mit beschränkter Haftung* – GmbH]). This was already the case prior to the entry into force of the Commercial Code, when the law considered “merchants” to be entrepreneurs and some company types were merchants by virtue of

<sup>9)</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958; LNLG 2011 No. 325.

<sup>10)</sup> *Cf.* also Government Opinion, 53/2010, 17. Today, Austria also reduced its appeal process to a single challenge at the Supreme Court.

<sup>11)</sup> *Cf.* also Government Opinion, No. 53/2010, 19.

<sup>12)</sup> Christoph Liebscher & Gerold Zeiler, *Der OGH und § 617 ZPO, Besprechung von 6 Ob 43/13m*, *ecolex* 425 (2014).

<sup>13)</sup> Blasy & Reithner in *DER GENERATIONENWECHSEL IN DER STIFTUNGSLANDSCHAFT* at 137 ff (E. A. Schurr ed., 2012).

<sup>14)</sup> Heinz Krejci in *RUMMEL, Section 1 CONSUMER PROTECTION ACT m. 13 (Konsumentenschutzgesetz – CPA)*<sup>3</sup> with further citations.

their legal form.<sup>15)</sup> But in Austria it is still today the case that, if a legal entity neither operates a business nor is an entrepreneur by virtue of its legal form, it can be a consumer.<sup>16)</sup> An example could be an association (Verein) or a private foundation (Privatstiftung). The consequence would be that a private foundation with a pure holding function will practically be unable to conclude an arbitration agreement (with the seat of the arbitration tribunal in Austria) for future disputes.<sup>17)</sup>

## 2. Legal Situation in Liechtenstein

The legal situation in Liechtenstein and Austria differs in terms of company law as the Commercial Code is still in the traditional form and there are still “merchants” by virtue of legal form in Liechtenstein. Pursuant to Section 33 (2) in conjunction with paragraph 1 of the Final Provisions of the Persons and Companies Act (*Schlussteil Personen- und Gesellschaftsrecht – FP-PCA*), all legal entities are merchants by virtue of their legal form. This includes, in particular, the AG, the GmbH, foundations, establishments,<sup>18)</sup> and registered trust enterprises.<sup>19)</sup> Thus, all private legal entities in Liechtenstein are to be classified as entrepreneurs as defined in the LCPA or the ACPA.<sup>20)</sup>

### B. Arbitration Clauses in Statutes and Articles of Association

The applicability of Section 634 LCCP or Section 617 ACCP (which both *de facto* bar a consumer from entering into an arbitration clause before the disagreement arose) to arbitration clauses in statutes, articles of association, and memorandums of association would lead to increased legal uncertainty regarding the validity of said arbitration clauses, in particular if several persons were involved.<sup>21)</sup>

<sup>15)</sup> Krejci in RUMMEL, *Section 1 CPA*<sup>3</sup> mn 7 with further citations.

<sup>16)</sup> Krejci in RUMMEL, *Section 1 CPA*<sup>3</sup> mn 13 with further citations.

<sup>17)</sup> NIKOLAUS ARNOLD, *PRIVATSTIFTUNGSGESETZ: KOMMENTAR Einleitung* mn 16 (3<sup>rd</sup> ed. 2007); Christian Dorda, *Österreichisches Schiedsrecht: Wunschlos glücklich?*, DBJ Newsletter 1–2 (2011).

<sup>18)</sup> A company type peculiar to Liechtenstein law.

<sup>19)</sup> A company type similar to establishments and based on the business trust company model.

<sup>20)</sup> This supposed legal certainty is, however, clouded by this issue having been discussed as an open-ended question when the LCPA was introduced. When drawing up the LCPA, the government overlooked the fact that Liechtenstein legal entities are merchants by virtue of their legal form.

<sup>21)</sup> Blasy & Reithner in *DER GENERATIONENWECHSEL IN DER STIFTUNGSLANDSCHAFT* at 146 (F. A. Schurr ed., 2012).

### 1. Legal Situation in Austria

The Austrian Supreme Court recently ruled for the first time on the applicability of Section 617 ACCP to disputes under company law.<sup>22)</sup> This case addressed the very different opinions on the applicability of Section 617 ACCP to disputes under company law in Austrian legal publications. Some authors had called for company law matters to be explicitly excluded from the applicability of consumer protection according to Section 617 ACCP in the 2012 law reform for the sake of legal certainty. Unfortunately, the Austrian legislator did not heed this call, which is why the legal situation remains unclear in Austria.

### 2. Legal Situation in Liechtenstein

In principle Liechtenstein case law has always accepted arbitration clauses in memorandums of association, statutes or by-laws.<sup>23)</sup> As far as consumer protection is concerned, there is no relevant case law, as legal entities in Liechtenstein are almost always set up by professional trustees in their own name. Hence, the establishment of a legal entity constitutes a legal transaction of one or more entrepreneurs without any consumer, which rules out the applicability of Section 634 LCCP from the very outset.

As far as foundations are concerned, they are established practically exclusively *inter vivos* pursuant to Section 552 (14) (1) PCA. Here, too, the formal enactment is almost always made by professional trustees, but even the direct establishment by a founder does not change anything. The establishment of a foundation is a unilateral declaration of intent that does not require a recipient.<sup>24)</sup> As it is no contract, Section 634 LCCP does not apply.

The same holds for the relationship between the foundation and a beneficiary: the beneficiary is named unilaterally by the respective foundation body or founder. This act requires neither receipt nor consent. The individual allocations of benefits, however, are subject to the beneficiary's consent, but they are still unilateral transactions, similar to a gift. Hence, again Section 634 LCCP cannot apply.<sup>25)</sup>

As one of very few civil law jurisdictions Liechtenstein knows the trust, and there the situation is slightly different from a foundation. A trust is not a legal en-

<sup>22)</sup> OGH, Nov 16, 2013, docket no. 6 Ob 43/13m (Austria).

<sup>23)</sup> Supreme Court, LES (= Liechtenstein collected decisions) 1987, 14; State Court decision 2013, 168 [Expansion 2.2.].

<sup>24)</sup> The establishment of a foundation by testamentary disposition or inheritance contract has no practical relevance.

<sup>25)</sup> In Liechtenstein, it is clearly recognized that the founder can prescribe an arbitration clause in the statutes that is binding on the beneficiaries: e.g. State Court decision 2014, 295 [Expansion 4.3], Court decision 2013, 285. For Austria: e.g. Krejci *in* RUMMEL, CC3 Section 1 CPA marginal number 2. Even when the Act mentions "legal transactions", they usually refer to contracts, as can be deduced from the Act's heading. The application of the CPA to purely unilateral beneficial allocations of benefits does not make sense either.

tity. The trust settlement is a contract concluded between the settlor and the trustee. Section 634 LCCP could apply if one of them is a consumer and the other an entrepreneur (such as a professional trustee). But there is a special provision for trusts under foreign law: Section 931 (2) PCA prescribes that trusts established in Liechtenstein under foreign law (applicable only for internal matters), a mandatory arbitration tribunal is to rule on disputes between trustees, settlors, and beneficiaries. Hence, the authors are of the opinion that the applicability of Section 634 LCCP cannot have been intended to apply to arbitration clauses in trust settlements. Otherwise, parliament would have blocked the typical client from having such a trust at all – as he would be not allowed to agree on an otherwise mandatory arbitral tribunal. But, as mentioned, there is no published case law on the issue.

When it comes to the legal relationship between the trustee and the beneficiary, the above comment to foundations applies equally to trusts: it is not a contractual relationship. As the name already indicates, the beneficiary is merely allocated benefits.

Based on the legal materials and the, in principle, liberal Liechtenstein company law,<sup>26)</sup> the authors' view is that Section 634 LCCP is not applicable to arbitration clauses in statutes, articles of association, or memorandums of association.

## V. Law Reform in Liechtenstein

Given the increased criticism of Section 617 ACCP in Austria the Government is currently considering to propose a reform of the corresponding Liechtenstein provision.<sup>27)</sup>

### A. Consumers

The general view is that Section 634 LCCP is overly constraining: the term "consumer" as defined in the LCPA is not a viable differentiation criterion. The background to the LCPA were "day-to-day consumer transactions" as carried out by "normal consumers." Company law relationships or contracts under company law do not constitute daily "consumption". Arbitration clauses are drawn up for international transactions but not for transactions of daily life. Furthermore, the degree of awareness and market strength of clients of professional trustees, some of them high net worth investors, varies considerably from normal consumers and such the corresponding need for protection. Finally, it has been observed in Liechtenstein that in Switzerland<sup>28)</sup> there are no corresponding constraints on arbitra-

<sup>26)</sup> Cf. also Government Opinion, No. 53/2010, 6.

<sup>27)</sup> Blasy & Reithner in *DER GENERATIONENWECHSEL IN DER STIFTUNGSLANDSCHAFT* at 152 (F. A. Schurr ed., 2012).

<sup>28)</sup> Arbitration is regulated in Section 353 *et seq.* Swiss Civil Procedure Code



tion agreements for consumers, and no abuse to their detriment has been noticed.<sup>29)</sup>

For these considerations and in order to enhance legal certainty in company law Section 634 LCCP is proposed to be phrased as follows:

*Section 634 LCCP*

1) An arbitration agreement between an entrepreneur and an individual can only be effectively concluded for existing disputes, except when

- a. the individual is an entrepreneur or
- b. the arbitration agreement and the consent of the individual is contained in a separate document, which may not contain any agreements other than the ones that refer to the arbitration proceedings, and the individual was advised on this subject by an attorney, trustee, or another professional legal advisor, and the latter confirms this in writing or the individual is represented by him or her when the agreement is concluded.

2) Arbitration clauses in statutes, articles of association, memorandums of association, foundation deeds, or trust settlements pursuant to Section 897 et seqq. PCA are binding independently of paragraph 1.

As can be seen from this draft, the term "consumer" is to be replaced by "individual," which should clarify the situation with regard to foundations. Without compliance with special formal requirements and advice, individuals shall only be able to conclude arbitration agreements for existing disputes. In principle, this will be a high level of protection from haste. But in the future, all participants in legal transactions will be able to conclude an arbitration agreement for future disputes, too, if they have been properly informed.

In the new second paragraph, and independent of any consumer issues, binding arbitration clauses may be prescribed in statutes, articles of association, memorandums of association, foundation deeds, or trusteeships.

## B. Arbitrability of the Supervisory Proceedings for Foundations and Trusts

For the sake of completeness, it should be mentioned that the third paragraph of Section 599 LCCP arbitrability could also be amended.<sup>30)</sup> There is an in-

(*Schweizerische Zivilprozessordnung*) (Classified compilation 272). International arbitration is regulated in Section 176 et seqq. Swiss Act on Private International Law (*Bundesgesetz über das internationale Privatrecht*) (Classified compilation 291).

<sup>29)</sup> The government's consultation report on the amendment of the Swiss Civil Procedure Code and the General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*) 13 f.

<sup>30)</sup> There is no corresponding counterpart to this paragraph in Austria; only the first two paragraphs correspond to the intention of Section 582 ACCP.



tense debate whether supervisory proceedings over foundations and trusts should be open for arbitration. However, the debate has not come to a stage where any view can be seen as prevailing.