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Section 617 of the Code of Civil Procedure – An Austrian Consumer Arbitration Paradox?

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Abstract: *This article examines the structural inconsistencies inherent in Section 617 of the Austrian Code of Civil Procedure. While the provision affords an extensive level of consumer protection, it does so in areas where such protection is neither required nor intended – for example, in corporate law disputes. At the same time, its effectiveness is substantially undermined by the prevailing view that Section 617 applies only to arbitrations seated in Austria. This article examines whether this prevailing view withstands scrutiny.*

Keywords: *arbitration, consumer disputes, corporate law disputes, ex ante arbitration agreements, ex post arbitration agreements, seat of arbitration, Section 617 of the Austrian Code of Civil Procedure, mandatory written legal advice*

Abstract: *Der Beitrag untersucht die strukturellen Inkohärenzen des § 617 ZPO. Einerseits bietet die Bestimmung Schutz, wo keiner erforderlich (und auch nicht erwünscht) ist – etwa bei gesellschaftsrechtlichen Streitigkeiten und Streitigkeiten über einen Anteilserwerb. Andererseits soll § 617 ZPO und der damit verbundene Schutz nach Rsp und Lit nur auf inländische Schiedsverfahren anwendbar sein. Folgt man dieser Ansicht, würde § 617 ZPO an seinem Ziel komplett "vorbeischießen". Dieser Beitrag stellt die diesbezügliche überwiegende Ansicht in Frage.*

Schlagworte: *Schiedsverfahren, Verbraucherstreitigkeiten, Gesellschafterstreitigkeiten, Ex-ante-Schiedsvereinbarungen, Ex-post-Schiedsvereinbarungen, Schiedsort, § 617 ZPO, Rechtsbelehrung*

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I. Introduction

Section 617 of the Austrian Code of Civil Procedure ("CCP") is an overly complex provision within the otherwise quite advanced and arbitration-friendly chapter on arbitration (Sections 577–618 CCP). As noted by multiple authorities, the said provision renders consumer arbitration in Austria practically impossible.[1]

A. Section 617 of the Code of Civil Procedure – Overview

Section 617 CCP sets out the following requirements for consumer arbitration proceedings:

• **Time of conclusion of an arbitration agreement**: The strongest consumer protection mechanism is provided by Section 617(1) CCP. This provision stipulates that arbitration agreements between entrepreneurs and consumers may only be concluded for disputes that have already arisen ("*nur für bereits entstandene Streitigkeiten*"). Thus, only so-called *ex post* arbitration agreements with consumers are valid, whereas *ex ante* arbitration agreements are not.

• **Form of the arbitration agreement**: Pursuant to Section 617(2) CCP, the arbitration agreement must be personally signed by the consumer, and the document may contain only arbitration-related provisions.[2]

• **Legal instructions**: Pursuant to Section 617(3) CCP, an entrepreneur must inform the consumer in writing of the most important differences between arbitration and court proceedings prior to the conclusion of the arbitration agreement ("*schriftliche Rechtsbelehrung*").

• **Seat of arbitration**: Pursuant to the first sentence of Section 617(4) CCP, the arbitration agreement must stipulate the seat of arbitration. In addition, pursuant to Section 617(5) CCP, the country in which the arbitration is seated must correspond to the country where the consumer has his domicile, habitual residence, or place of employment. An arbitration agreement that does not meet

[1] Christoph Stippl, *4. Kapitel. Sonderbestimmungen für bestimmte Privatrechtsmaterien*, in SCHIEDSVERFAHRENSRECHT I para. 4/9 (Christoph Liebscher, Paul Oberhammer & Walter H. Rechberger eds., 2011); Katharina Plavec, *§ 617 ZPO*, in ZPO-ON para. 12 (Georg Kodek & Paul Oberhammer eds., 2023); *see also* PAUL OBERHAMMER, ENTWURF EINES NEUEN SCHIEDSVERFAHRENSRECHTS 42 (2002); Paul Oberhammer, *Rechtspolitische Schwerpunkte der Reform*, in DAS NEUE SCHIEDSRECHT 93, 101 (Barbara Kloiber et al. eds., 2006); ANDREAS REINER, SCHIEDSRECHT n.232 (2006); Christian Hausmaninger, *§ 617 ZPO*, in KOMMENTAR ZUR ZPO – BAND IV/2 para. 25 (Hans Fasching & Andreas Konecny eds., 3d ed. 2017).

[2] This provision essentially corresponds to Section 1031(5) of the German Code of Civil Procedure.

these criteria is ineffective, unless the consumer expressly invokes it (second sentence of Section 617(5) CCP).

• **Place of the oral hearing and the taking of evidence**: The second sentence of Section 617(4) CCP provides that the oral hearing and the taking of evidence may take place at a location other than the seat of arbitration only if the consumer consents to this after the dispute has arisen, or if taking evidence at the seat of arbitration would impose considerable burdens.

• **Annulment and declaratory proceedings**: Section 617(6) and (7) CCP expand the catalogue of grounds for annulment under Section 611(2) CCP. For actions for setting aside an arbitral award, for a declaration of the existence or non-existence of an arbitral award, as well as for proceedings under the Third Title in arbitration proceedings involving a consumer, Sections 617(8) and (9) CCP deviate from the general rule on jurisdiction pursuant to Section 615 CCP and provide for recourse to the Regional District Court ("*Landesgericht*") which is subject to appeal to the Court of Appeal ("*Oberlandesgericht*") and further appeal to the Supreme Court (instead of a direct recourse to the Supreme Court, which is the rule for B2B arbitrations). Section 617(10) CCP addresses the applicable procedural rules, and Section 617(11) CCP allows for the exclusion of the public from the proceedings where the requesting party has a legitimate interest in confidentiality.[3]

B. Difficulties Arising from the Application of Section 617 CCP

Section 617 CCP is problematic in several respects. It provides consumer protection in areas where it is neither necessary nor, in most cases, desired – for example, in corporate law disputes and disputes concerning share purchase agreements.[4] This is a consequence of the (over)broad definition of "consumer" under Section 617 CCP, which frequently includes shareholders and partners.[5]

[3] This article will not examine the jurisdictional and procedural provisions contained in Section 617(8)–(11), which were introduced as part of the 2013 Arbitration Law Amendment Act (Schiedsrechts-Änderungsgesetz 2013 [SchiedsRÄG 2013] Bundesgesetzblatt I [BGBl I] No. 118/2013) in any detail. Those provisions merely preserved the three-tier appellate structure for consumer arbitration proceedings that had already been in place prior to the 2013 reform (Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 24 Beilage [Blg] No. 2322, at 3 [Austria]).

[4] *See* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m (Austria); *see infra* Section II.A.2.

[5] The status of a shareholder as an entrepreneur has been affirmed in the following instances: where the individual held at least a 50% share in a limited liability company (GmbH) (OGH, June 24, 2010, 6 Ob 105/10z [Austria]); in the presence of a blocking minority, provided the shareholder exercised *de facto* influence over the company's management (OGH, Apr. 24, 2012, 2 Ob 169/11h

However, this does not mean that such disputes involving Austrian shareholders or partners are not frequently resolved through arbitration. In practice, the parties often opt for a foreign seat of arbitration whose *lex arbitri* does not preclude such disputes – for instance, Switzerland or Liechtenstein. Consequently, the overreach of Section 617 CCP does not strengthen consumer protection – which is typically unwarranted in such cases – but instead undermines Austria's attractiveness as a seat of arbitration.

It should also be noted that, according to case law[6] and legal commentary,[7] Section 617 CCP (in particular, the first paragraph of that section) provides a protection mechanism that applies exclusively to arbitration proceedings seated in Austria (domestic arbitration proceedings).[8] Under this view, Section 617 CCP does not extend to arbitration proceedings seated outside Austria (foreign arbitration proceedings), even in cases involving Austrian consumers. This interpretation of Section 617 would render Section 617 CCP largely ineffective, as it fails to provide a plausible justification for treating Austrian consumers differently based solely on the arbitral seat.

Section 617 CCP thus resembles a "pot boiling over". It grants excessive protection where none is ordinarily needed or desired. At the same time, it is full of holes, since the protective mechanism it provides (in particular, Section 617(1) CCP) can be circumvented by choosing a foreign seat of arbitration. Proposed amendments to Section 617 CCP are intended to remedy the first shortcoming (these would

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[Austria]); where the shareholder acted as a managing director with sole power of representation and held a 49% stake (OGH, June 27, 2016, 6 Ob 95/16p [Austria]) or a 40% stake (OGH, Feb. 28, 2018, 6 Ob 14/18d [Austria]); and in the case of an atypical limited partner who, together with his managing partner brother, was actively involved in the actual management of the limited partnership (OGH, Mar. 19, 2013, 4 Ob 232/12i [Austria]); Thomas Herbst, Christine Möhler & Daniel Widmann, *3. Kapitel: IV. Schiedsvereinbarungen und Konsument:innen-/Arbeitnehmer:innenschutz*, in SCHIEDSGERICHTSBARKEIT para. 631 (Hellwig Torggler et al. eds., 3rd ed. 2024); *see also* Alexander Klauser & Kathrin Binder, *20. Kapitel. Schiedsvereinbarungen mit Verbrauchern*, in HANDBUCH SCHIEDSRECHT para. 20.32 (Dietmar Czernich, Astrid Deixler-Hübner & Martin Schauer eds., 2018) and Susanne Kalss, *22. Kapitel. Gesellschaftsrecht*, in HANDBUCH SCHIEDSRECHT para. 22.40 (Dietmar Czernich, Astrid Deixler-Hübner & Martin Schauer eds., 2018); *see also* GEROLD ZEILER, ALFRED SIWY & THOMAS HERBST, SCHIEDSVERFAHREN § 617 paras. 8 *et seqq.* (3rd ed., 2025) (with further references).

[6] Oberster Gerichtshof [OGH] [Supreme Court] July 22, 2009, 3 Ob 144/09m, para. 3.2 (Austria); OGH, Dec. 16, 2013, 6 Ob 43/13m (*obiter*) (Austria).

[7] *See*, *e.g.*, Herbst, Möhler & Widmann, *supra* note 5, para. 642; Plavec, *supra* note 1, para. 5; Stippl, *supra* note 1, para. 4/17; Markus Schifferl, *O. Verbraucher und Arbeitnehmer*, in HANDBUCH SCHIEDSGERICHTSBARKEIT UND ADR para. 12 (Michael Nueber ed., 2021); ZEILER, SIWY & HERBST, *supra* note 5, § 617 para. 1a.

[8] *See infra* Sections II.A. and II.B.2.

exclude shareholder disputes and disputes concerning share purchase agreements from its scope of application).[9] The present article addresses the second shortcoming, as the scope of application of Section 617 CCP remains fraught with legal uncertainty, even despite statements by the Austrian Supreme Court which would seem unambiguous on their face. Before we turn to this issue, we provide a brief overview of the relevant case law of the Austrian Supreme Court.

II. Scope of Application of Section 617 CCP

A. Applicability of Section 617 CCP Solely to Arbitrations Seated in Austria – Case Law of the Austrian Supreme Court

The only two Supreme Court decisions concerning Section 617 CCP are an enforcement case (case no. 3 Ob 144/09m) and an annulment case (case no. 6 Ob 43/13m). At first glance, both decisions provide a clear answer to the question of the applicability of Section 617 CCP. However, in the opinion of the author, this initial conclusion does not necessarily withstand closer scrutiny.

1. Case no. 3 Ob 144/09m[10]

a) Facts and Legal Analysis

This case concerned a declaration of enforceability and enforcement of a Danish (*i.e.*, foreign) arbitral award dated 12 June 2006. The underlying dispute arose from a franchise agreement dated 19 April 2004 between a Danish company (acting as the enforcing party, and previously as claimant in the arbitration proceedings) and an Austrian limited liability company (acting as the third party opposing enforcement, and previously as respondent in the arbitration proceedings). The parties had included an arbitration clause in Clause 22 of the franchise agreement and selected the Arbitration Rules of the Danish Arbitration Institute. Clause 25 of the franchise agreement contained a declaration of accession by two Austrian nationals: one being the managing director of the Austrian limited liability company, and the other the person who had initiated the business relationship (acting as the first and second parties opposing enforcement, and previously as respondents in the arbitration proceedings). The court of first instance declared the Danish arbitral award enforceable and, that same day, granted enforcement by way of a separate decision. The first and second parties opposing enforcement

[9] *See* Initiativantrag [Legislative Proposal] No. 3826/A, Gesetzgebungsperiode [GP] 27, at 1 (Austria).
[10] Oberster Gerichtshof [OGH] [Supreme Court] July 22, 2009, 3 Ob 144/09m (Austria).

appealed this decision. The appellate court dismissed the appeal in part,[11] and the aforementioned parties brought the matter before the Austrian Supreme Court.

The two parties opposing enforcement argued that there were grounds for refusal under Article V(1)(a) and (c) of the New York Convention 1958 ("NYC") (and Article V of the European Convention on International Commercial Arbitration 1961), as they had not signed the arbitration agreement. However, according to the arbitral tribunal seated in Denmark, the parties failed to challenge the tribunal's jurisdiction in a timely manner. Pursuant to Article V(2) of the European Convention on International Commercial Arbitration 1961, the question of whether the parties were indeed precluded from raising jurisdictional objections is, in principle, subject to review by the state courts. In appellate proceedings before the Austrian Supreme Court, a party would also have to demonstrate that the issue raises a substantial question of law ("*erhebliche Rechtsfrage*"), which the parties opposing enforcement failed to do.[12]

The most interesting part of this decision is para. 3.2,[13] in which the Austrian Supreme Court addressed consumer protection. In a nutshell, the Court held that

[11] The appeal was upheld with regard to the question of the interest rate. However, this issue is not relevant for purposes of determining the applicability of Section 617 CCP and we will thus not delve into it here. The appellate court, however, found that the first and second parties opposing enforcement did not qualify as consumers under Austrian and EU law (*see* OGH, July 22, 2009, 3 Ob 144/09m (Austria): "Aus der Formulierung ihrer Beitrittserklärung zum Franchisevertrag (Punkt 25) gehe zweifelsfrei hervor, dass sie in ihrer Funktion als Bürgen hier nicht Konsumenten im Sinn des österreichischen sowie des EU-Rechts gewesen seien." [in German]).

[12] Moreover, they entirely failed to engage with the arbitral tribunal's reasoning.

[13] Oberster Gerichtshof [OGH] [Supreme Court] July 22, 2009, 3 Ob 144/09m, para. 3.2 (Austria): "Zwar kann ein Verstoß gegen konsumentenrechtliche Bestimmungen (hier – wie schon vom Rekursgericht klargestellt wurde, was die Verpflichteten einfach ignorieren – nicht gegen § 617 ZPO, der für Entscheidungen ausländischer Schiedsgerichte nach § 577 Abs 2 ZPO nicht gilt) grundsätzlich den materiellrechtlichen ordre public verletzen (*Hausmaninger* in *Fasching/Konecny*² § 611 ZPO Rz 224). Das ist aber zu Art V Abs 2 lit a NYÜ für die Schiedsvereinbarung zu verneinen. Eine solche Vereinbarung ist auch für Verträge zwischen Unternehmern mit Konsumenten zulässig (§ 6 Abs 2 Z 7 KSchG; *Hausmaninger* aaO § 617 Rz 19), wenn auch nur nach konkretem Aushandeln. Art 14 KSchG (nur eingeschränkte Zuständigkeitsvereinbarungen) wurde bisher analog auf Schiedsvereinbarungen angewendet (*Kathrein* in KBB² § 14 KSchG Rz 2; *Rechberger/Melis* in Rechberger³ § 617 ZPO Rz 1 e) je mwN). Einen Verstoß gegen diese Norm machen die Verpflichteten mit dem – wie dargelegt unzutreffenden – Hinweis auf § 617 ZPO geltend. Dieser Einwand wird aber wiederum schon durch die Einlassung vor dem Schiedsgericht (s oben 3.1.) entkräftet (*Rechberger/Melis* aaO mwN). Die Vereinbarung eines Schiedsgerichts an sich kann aber nicht gegen die Grundwertungen des österreichischen Rechts verstoßen. Dass das auch der Gesetzgeber so sieht, zeigt der neue (hier, wie gesagt, unanwendbare) § 617 Abs 6 Z 1 ZPO, der überflüssig wäre, wenn die zwingenden konsumentenrechtlichen Bestimmungen durchwegs zum ordre public zählten und daher unter § 611 Abs 2 Z 8 ZPO fielen. Dass die Klausel nicht ausgehandelt worden wäre, bringen die Verpflichteten auch gar nicht vor. Damit machen sie aber – aus der Aktenlage

(a) Section 617 CCP does not apply to decisions of arbitral tribunals seated outside Austria, because Section 577(2) CCP does not mention it, and (b) that, in principle, breaches of consumer protection rules can constitute a violation of public policy.

Following this, the Supreme Court addressed the objective arbitrability of consumer disputes under Article V(2)(a) of the New York Convention. In this context, the Court stated that an arbitration agreement may indeed be concluded between entrepreneurs and consumers, and referred to Section 6(2)(7) of the Austrian Consumer Protection Act ("ACPA"), which stipulates that B2C arbitration agreements must be individually negotiated (*i.e.*, not included in general terms and conditions), failing which they will be deemed non-binding.

The Supreme Court then addressed Section 14 ACPA, which limits the ability of B2C parties to conclude jurisdiction agreements and has thus far been applied to arbitration proceedings by analogy. However, the Supreme Court declined to apply Section 14 in this case, as the parties opposing enforcement had submitted to the arbitral proceedings without raising a timely jurisdictional objection.

Ultimately, the Austrian Supreme Court addressed the question of whether the conclusion of a B2C arbitration agreement, as such, violated the fundamental values of the Austrian legal system. The Court found that it did not. In its reasoning, the Supreme Court relied on the fact that Section 617(6)(1) CCP extends the catalogue of possible grounds for annulment to include all mandatory provisions of consumer protection law. Such an expansive interpretation would be unnecessary if every mandatory consumer protection provision already formed part of public policy and was thus encompassed by Section 611(2)(8) CCP. According to the Austrian Supreme Court, the parties opposing enforcement failed to demonstrate any violation of public policy under Article V(2)(b) of the New York Convention, as they did not even argue that the arbitration clause had not been individually negotiated.

b) Criticism

Case no. 3 Ob 144/09m concerns an arbitration agreement concluded in October 2004. For that reason alone, the Austrian courts – including the Austrian Supreme Court – could not have relied on Section 617 CCP.[14] That provision was only

ergibt sich dazu nichts – auch einen Verstoß gegen den ordre public nach Art V Abs 2 lit a NYÜ nicht hinreichend geltend." (in German).

[14] *See also* Veit Öhlberger, *Zur (Nicht-)Anwendung schiedsrechtlicher Verbraucherschutznormen in ausländischen Schiedsverfahren – Bemerkung zu OGH 22. 7. 2009, 3 Ob 144/09m,* ÖJZ 188, 188 (2010).

introduced by the Arbitration Act 2006, which entered into force on 1 July 2006 (Article VII(1) CCP). Accordingly, the validity of arbitration agreements concluded before 1 July 2006 must be assessed under the previous legal regime (Article VII(3) CCP).[15] It is therefore unclear why the Austrian Supreme Court addressed the material scope of Section 617 CCP, which was in any case inapplicable from a temporal perspective. Moreover, case no. 3 Ob 144/09m involved an unlikely scenario in which the parties had failed to raise an objection to the arbitral tribunal's jurisdiction and would consequently have been precluded from invoking Section 14 ACPA and – most likely, some parts of – Section 617 CCP in any event. For all of these reasons, the Supreme Court's decision should be treated with the utmost caution.

2. Case no. 6 Ob 43/13m[16]

Case no. 6 Ob 43/13m related to arbitration proceedings seated in Austria (*i.e.*, domestic arbitration proceedings). In such cases, the applicability of Section 617 CCP is undisputed, provided that its requirements are met.

The underlying dispute involved a joint venture agreement for distribution of a Bulgarian fruit juice brand. The applicants requesting the Austrian courts to set aside the arbitral award (previously the respondents in the arbitration proceedings) challenged the validity of the arbitration agreement pursuant to the first alternative of Section 611(2)(1) CCP. They arguably qualified as consumers under Austrian law pursuant to Section 617 CCP and, as such, were not capable of concluding a valid arbitration agreement.

The party opposing the application for setting aside argued that the Austrian Consumer Protection Act was not applicable, and – even if it were – that the applicants for setting aside qualified as entrepreneurs under Austrian law and thus had the capacity to conclude a valid arbitration agreement.

The court of first instance and the court of appeal found that the applicants for setting aside were acting as entrepreneurs and therefore found the arbitration agreements valid. The court of appeal further noted that the question of whether a person qualifies as a "consumer" under Section 617 CCP is governed by Austrian law. The matter was subsequently appealed to the Austrian Supreme Court, which

[15] *See*, *e.g.*, Hausmaninger, *supra* note 1, para. 11.

[16] Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m (Austria); *see also* Christian Aschauer, *A landmark decision of the Austrian Supreme Court clarifying when parties to arbitration agreements should be treated as consumers or entrepreneurs*, SLOVENSKA ARBITRAŽNA PRAKSA 4, 4 *et seq.* (2014).

had to determine the law applicable to a person's legal status as a consumer. Specifically, the Austrian Supreme Court had to decide whether this question was governed by Austrian law (and thus by Section 1 ACPA) or by the law governing personal legal status pursuant to Section 12 and Sections 9 and 10 of the Austrian Private International Law Act.

The Supreme Court conducted an in-depth analysis of whether the personal scope of application of Section 617 CCP could be restricted in consideration of the policy goals of this rule ("*teleologische Reduktion*"). In particular, it addressed the views of various legal scholars suggesting that corporate law-related disputes or arbitrations with an international element fall outside the scope of Section 617 CCP – and expressly rejected these views. The most notable part of the Supreme Court's legal reasoning, however, was its reference to the decision no. 3 Ob 144/09m, in which it reiterated that Section 617 CCP – like the other provisions in the Fourth Chapter of the CCP – does not apply to arbitral proceedings seated outside Austria. The Supreme Court also reaffirmed that any detriment suffered by consumers in foreign arbitrations can only be raised in Austrian enforcement proceedings.

However, as noted in the introduction, the arbitral proceedings underlying case no. 6 Ob 43/13m were seated in Austria. Accordingly, the Supreme Court's remarks regarding the inapplicability of Section 617 CCP to foreign-seated arbitrations must be regarded as *obiter dictum*.

After undertaking a detailed analysis, the Supreme Court classified a person's status as a consumer under Section 617(1) CCP as a question pertaining to the validity of the arbitration agreement – an issue governed by the law of the seat of arbitration.[17] In the case of an arbitration seated in Austria, a person's status as a consumer is thus typically governed by Austrian law. However, the "normal case" reveals one of several weaknesses of such a classification: as the Supreme Court

[17] Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m, para. 7.6 *et seq.* (Austria): „Im Vorigen wurde bereits darauf hingewiesen, dass § 617 Abs 1 ZPO ein Wirksamkeitserfordernis der Schiedsvereinbarung darstellt. Dies spricht aber dafür, bei einem in Österreich gelegenen Schiedsort regelmäßig österreichisches Recht und damit das KSchG anzuwenden (*Stippl* aaO Rz 4/27). Dies steht auch mit der Regelung des Art V Abs 1 lit a des New Yorker Übereinkommens in Einklang; demnach ist mangels Rechtswahl das Recht des Staats anzuwenden, in dem der Schiedsspruch ergangen ist bzw ergehen soll. […] Zusammenfassend ist daher die Verbrauchereigenschaft nach § 617 ZPO nach österreichischem Recht zu beurteilen. Für eine in der Literatur gelegentlich vorgeschlagene Differenzierung nach der Staatsangehörigkeit (so *Stippl* aaO Rz 4/132) in dem Sinne, dass der Schutz des § 617 ZPO nur österreichischen Staatsbürgern zugute komme, besteht kein Raum. […]" (in German).

itself notes, the arbitral parties are free to choose the law applicable to the arbitration agreement and thereby exclude the applicability of Section 617 CCP – even in arbitrations with a domestic seat.[18] Whether Section 617 CCP imposes limits on such a choice of law (assuming such a choice is even permissible from the perspective of substantive consumer protection law) cannot be determined from the Supreme Court's decision in case no. 6 Ob 43/13m. Ultimately, the Supreme Court denied both applicants consumer status under Section 617 CCP and rejected the application for setting aside.

B. If Section 617 CCP is Applicable only to Domestic Arbitration Proceedings, Does this Deprive Austrian Consumers of Legal Protections?

1. Scenarios in which Austrian Courts are Confronted with the Question of Applicability of Section 617 CCP if Arbitral Seat is Abroad

Austrian courts might be confronted with the applicability of Section 617 CCP to foreign arbitrations in at least two situations. In the first situation, Austrian courts might deal with the enforcement of a foreign arbitral award under the New York Convention (possibly) against Austrian consumers. This situation corresponds to case no. 3 Ob 144/09m. As noted earlier, the prevailing view is that Section 617 CCP is irrelevant in such cases, as it applies only to domestic arbitration proceedings. Any detriment suffered by (Austrian) consumers in foreign arbitrations can – in the words of the Supreme Court – only be raised by invoking grounds for refusal of recognition and enforcement under Article V of the New York Convention (in particular, a violation of public policy).[19] However, according to the widespread view, violations of Section 617 CCP are not considered violations of public policy under Article V(2)(b) of the New York Convention[20] or any other grounds for refusal of enforcement under the New York Convention.[21]

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[18] *See already* Dietmar Czernich, *Anwendbares Recht zur Bestimmung der Verbrauchereigenschaft im Schiedsverfahren*, RECHT DER WIRTSCHAFT 251, 252 (2014).

[19] *See* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m, para. 5.2 (Austria); OGH, July 22, 2009, 3 Ob 144/09m, para. 3.2 (Austria).

[20] *See*, in detail, Stippl, *supra* note 1, paras. 4/49, 4/104 *et seqq.*; Herbst, Möhler & Widmann, *supra* note 5, para. 651; Öhlberger, *supra* note 14, at 188; *but see* Christian Koller, *Schiedsvereinbarungen in Allgemeinen Geschäftsbedingungen*, in AKTUELLES AGB-RECHT 155, 189 *et seq.* (Rainer Knyrim et al. eds., 2008): "Vor diesem Hingergrund ist jedenfalls nicht auszuschließen, dass § 617 ZPO einen Teil des österreichischen *ordre public* bildet [....]" (in German).

[21] *E.g.*, an infringement of Section 617(1) CCP does not fall under any other ground for refusal of enforcement under the New York Convention (which is relevant in case of a foreign arbitral award)

The second situation pertains to an Austrian consumer,[22] who pursues a claim (against an entrepreneur) before an Austrian civil court despite an existing arbitration agreement between the two parties designating a foreign arbitral seat.[23] Parts of legal literature expect that Austrian courts would apply Section 617 CCP in such a case if a consumer with an Austrian domicile is involved.[24] They advocate that the law of consumer's domicile at the time of the contract conclusion should govern the consumer related issues.[25] Other parts of legal literature suggest that there is a possibility that an Austrian consumer initiates parallel proceedings before an Austrian civil court (*see* Section 617(5) CCP) after being sued before an arbitral tribunal.[26]

It is unclear whether the Austrian courts would – in the second situation – maintain its position that Section 617 CCP does not apply to an arbitration agreement designating a foreign seat of arbitration.[27] In any case, the Supreme Court implied that it would apply Section 14 ACPA if the consumer did not waive it.[28]

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such as lack of objective arbitrability of the dispute (Art V[2][a] of the NYC) or lack of subjective arbitrability (Art V[1][a] of the NYC). Similarly, Art II of the New York Convention takes precedence over Section 617(2) and (3) CCP; *see*, in detail, Stippl, *supra* note 1, paras. 4/100, 4/104 *et seq.*; Oberhammer, *supra* note 1, at 103; *see also* Schifferl, *supra* note 7, para. 16 and Öhlberger, *supra* note 14, at 188 (both with regard to Section 617(1) CCP).

[22] For the purposes of this article, an Austrian consumer is a consumer as defined under Austrian law; this article will not examine which law governs the question of who qualifies as a consumer and who qualifies as an entrepreneur; *see*, *e.g.*, Czernich, *supra* note 18, at 251 *et seq*. and ZEILER, SIWY & HERBST, *supra* note 5, § 617 para. 8e.

[23] *See* Koller, *supra* note 20, at 186 *et seq.* [footnote 187].

[24] Franz Hartlieb & Brian S. Oiwoh, *20 Stifterstreit und Schiedsrecht*, in GESELLSCHAFTERSTREIT para. 20/33 (Nikolaus Adensamer & Johannes Mitterecker eds., 2021); *see also* Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 30 (Austria) (in the author's opinion, this corresponds to the legislature's intent).

[25] Hartlieb & Oiwoh, *supra* note 24, at para. 20/33 (as part overriding mandatory rules); *see also* Peter Mankowski, *6. Kapitel. Anwendbares Recht*, in HANDBUCH SCHIEDSRECHT paras. 6.44 *et seq.* (Dietmar Czernich, Astrid Deixler-Hübner & Martin Schauer eds., 2018) (with further references); Czernich, *supra* note 18, at 252.

[26] Koller, *supra* note 20, at 186 *et seq.* [footnote 187]: However, once the "foreign" arbitral tribunal has rendered its award (in violation of Section 617(5) CCP or any other paragraph of Section 617 CCP), Austrian courts may only review such an award on the grounds for refusal under the New York Convention.

[27] *See also* Hartlieb & Oiwoh, *supra* note 24, at para. 20/33.

[28] *See* Section 14(2) ACPA; if an Austrian consumer submits to the arbitral proceedings without raising a timely jurisdictional objection – same as in the case no. 3 Ob 144/09m, a violation of Section 14 ACPA shall be cured (in German: "*rügelose Einlassung*"); it remains unclear whether a violation of Section 617(5) CCP can, in principle, be cured in the same way as the violation of Section 14 ACPA. In support of this view: *see*, Herbst, Möhler & Widmann, *supra* note 5, para. 646;

In any case, it is widely undisputed that Austrian courts would apply Section 6(2)(7) ACPA in both situations.[29] This provision renders consumer arbitration agreements that are not individually negotiated ineffective and constitutes part of Austrian public policy under Article V(2)(b) NYC.[30] Moreover, Section 6(2)(7) ACPA transposes Articles 3 and 6 of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 into Austrian law,[31] which even constitute a part of EU public policy.[32] However, it must be noted that the level of consumer protection provided by Section 617 CCP might be somewhat broader than that provided by Section 6(2)(7) ACPA. The applicability of Section 617 CCP outside the domestic context may therefore play a crucial role for Austrian consumers in certain cases.

Schifferl, *supra* note 7, para. 29; contrary to Herbst, Möhler & Widmann, *supra* note 5, para. 646 [footnote 1189], the Austrian Supreme Court in case no. 3 Ob 144/09m confirmed this only with regard to Section 14 ACPA and not to the – according to the Supreme Court – non-applicable Section 617 CCP.

[29] Moreover, it is widely undisputed that Section 6(2)(7) ACPA applies besides Section 617 CCP even in purely domestic context (*i.e.*, if the seat of arbitration is in Austria); *see*, *e.g.*, ZEILER, SIWY & HERBST, *supra* note 5, § 617 para. 6a; Manuel Nueber, *§ 617 ZPO*, in ZPO:TASCHENKOMMENTAR para. 4 (Johann Höllwerth & Helmut Ziehensack eds., 2nd ed. 2024).

[30] Stippl, *supra* note 1, para. 4/107; Herbst, Möhler & Widmann, *supra* note 5, para. 653; *see also* Nueber, *supra* note 29, para. 4.

[31] Manuel Nueber, *Schiedsvereinbarungen mit Verbrauchern im GmbH-Recht*, Zak 48, 51 (2010): "Auch die Klausel-RL 93/13/EWG aufgrund derer auch § 6 Abs 2 Z 7 KSchG in das österr Konsumentenschutzrecht eingefügt wurde, und die dazu ergangene EuGH-Judikatur (Rs C-168/05, Mostaza Claro) lassen erkennen, dass das durch die Richtlinie eingeführte Schutzsystem davon ausgeht, dass sich der Verbraucher gegenüber dem Unternehmer in einer schwächeren Position befindet und einen geringeren Informationsstand besitzt." (in German) / "Directive 93/13/EEC on unfair terms in consumer contracts, on the basis of which § 6(2)(7) of the Austrian Consumer Protection Act (ACPA) was introduced, and the related case law of the Court of Justice of the European Union (Case C-168/05, Mostaza Claro), make it clear that the system of protection established by the Directive is based on the assumption that the consumer is in a weaker position vis-à-vis the trader and has a lower level of information." (unofficial English translation); *see also* Nueber, *supra* note 29, para. 4; Hausmaninger, *supra* note 1, para. 165; Stippl, *supra* note 1, para. 4/72.

[32] It is settled case law of the European Court of Justice that these provisions qualify as rules of EU public policy and must therefore be applied *ex officio* by both arbitral tribunals and (enforcement) state courts; *see* Case C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL, ECLI:EU:C:2006:675, paras. 35–39 (Oct. 26, 2006); Case C-40/08, Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira, ECLI:EU:C:2009:615, paras. 52 *et seq*. (Oct. 6, 2009); Case C-76/10, Pohotovosť s.r.o. v. Iveta Korčkovská, ECLI:EU:C:2010:685, paras. 50 *et seq.* (Nov. 16, 2010).

2. General Considerations

As noted earlier, the prevailing view in case law[33] and legal literature[34] is that Section 617 CCP applies only to arbitration proceedings seated in Austria (*i.e.*, domestic arbitration proceedings). In the view of the Austrian Supreme Court, this is "clearly evident" ("*unzweifelhaft*") from both the wording and the systematic interpretation of Section 617 CCP.[35] In particular, Section 617 CCP does not apply to arbitration proceedings seated outside Austria, since it is not mentioned in Section 577(2) CCP.[36]

This rationale would lead one to conclude that the protection afforded to an Austrian consumer against entering into an *ex ante* arbitration agreement under Section 617(1) CCP would depend on whether the arbitration is seated in Austria or abroad. Conversely, a foreign consumer involved in domestic arbitration proceedings would benefit from the protection of Section 617(1) CCP. More striking still: such an outcome would be the same even if the "foreign consumer" did not qualify as a consumer under the law governing personal status. The Austrian Supreme Court treats consumer status as a matter of the substantive validity of the arbitration agreement and applies the Austrian Consumer Protection Act accordingly.[37]

In the author's opinion, this result seems not only odd but also inconsistent, as it leads to unjustified unequal treatment of Austrian consumers – the very group the provision aims to protect. There is no objective reason why an Austrian consumer should be permitted to validly conclude an *ex ante* arbitration agreement with a foreign seat, while that same Austrian – or even a foreign consumer – is precluded from doing so under Section 617(1) CCP if the arbitration agreement provides for an Austrian seat. It remains unclear why the seat of arbitration should determine the level of protection afforded to Austrian consumers under Section 617 CCP. The same applies *mutatis mutandis* to the requirements of Section 617(3) CCP.

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[33] Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m (*obiter*) (Austria); OGH, July 22, 2009, 3 Ob 144/09m (Austria).

[34] *See* Stippl, *supra* note 1, para. 4/16; Herbst, Möhler & Widmann, *supra* note 5, paras. 642, 651; Plavec, *supra* note 1, para. 5; *but see* Hausmaninger, *supra* note 1, paras. 19-25, seemingly leaving the issue open.

[35] Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m, para. 5.1 (Austria).

[36] Oberster Gerichtshof [OGH] [Supreme Court] July 22, 2009, 3 Ob 144/09m, para. 3.2 (Austria); Section 577(2) CCP governs the applicability of the Fourth Chapter of CCP (Sections 577-618 CCP) to the arbitrations seated outside Austria.

[37] *See* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m, paras. 7.2–7.7 (Austria).

This contradiction becomes even more apparent in light of Section 617(5) CCP, which prevents Austrian consumers from being subject to arbitration seated outside Austria – even if the arbitration agreement was concluded after the dispute arose (*ex post*) and all of the other consumer protection requirements under Sections 617(2), (3), and (4) CCP are met.[38] Pursuant to Section 617(5) CCP, consumer arbitration agreements that designate a seat of arbitration other than the consumer's domicile, habitual residence or place of employment are not binding unless the consumer expressly invokes them.

In the author's opinion, two key considerations must be borne in mind when evaluating the Austrian Supreme Court's statements on Section 617 CCP. First, the arbitration proceedings underlying annulment case no. 6 Ob 43/13m were seated in Austria, and the question of whether Section 617 CCP also applied to arbitration proceedings seated abroad was therefore not at issue. The Austrian Supreme Court instead focused on the more controversial question of whether corporate arbitration disputes are generally excluded from the scope of Section 617 CCP – a view that had found broad support among legal scholars. The Court rejected the arguments in favour of such an interpretation, particularly the proposed distinction between international and domestic arbitration.[39] Recently, legislative amendments have been proposed to address the shortcomings of Section 617 CCP in relation to corporate law disputes.[40] As noted in the amendment proposal of 31 January 2024, the parties involved in corporate disputes generally do not seek the type of legal protections provided under Section 617 CCP and, moreover, they differ significantly from typical consumers as defined in the Austrian Consumer Protection Act (including Section 617 CCP).[41]

Second, it is possible to remedy the unequal treatment of Austrian consumers resulting from the fact that Section 577(2) CCP does not refer to Section 617 CCP through statutory interpretation. This issue will be examined in subchapter II.C.

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[38] *See*, in detail, Section II.C; *see also* Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 30 (Austria).

[39] Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m, paras. 4.1–5.6 (Austria).

[40] Initiativantrag [Legislative Proposal] No. 3826/A, Gesetzgebungsperiode [GP] 27, at 1 (Austria); however, the adoption of the proposed amendments does not seem very probable due to the current political climate in Austria.

[41] Initiativantrag [Legislative Proposal] No. 3826/A, Gesetzgebungsperiode [GP] 27, at 1 (Austria).

C. Must Section 617 CCP Likewise Apply to Foreign Arbitration Proceedings Involving Austrian Consumers?

1. Legislative Process

A comparison of the various drafts circulated during the legislative process suggests that the Austrian legislature either overlooked including a reference to Section 617 CCP in Section 577(2) or assumed that Section 617 applies whenever Austrian consumers are involved in any event. The chronological sequence of these drafts is as follows: the draft of the Working Group of the Ludwig Boltzmann Institute ("LBI Draft"), the Ministerial Bill ("MB"), and finally, the Government Bill ("GB"). The latter was passed unchanged by the Austrian Parliament.

LBI Draft	**Ministerial Bill**	**Government Bill (adopted without changes by the Austrian Parliament)[42]**
Scope of Application		
Section 577 para. 1 CCP: The provisions of this Chapter shall apply if the seat of the arbitral tribunal is within Austria.	Section 577 para. 1 CCP: The provisions of this Chapter shall apply if the seat of the arbitral tribunal is within Austria.	Section 577 para. 1 CCP: The provisions of this Chapter shall apply if the seat of the arbitral tribunal is within Austria.
Section 577 para. 2 CCP: Sections 578, 580, 583, 584, 585, 593 paragraphs (3) to (6), sections 602, 613 and 615 shall also apply if the seat of the arbitral tribunal is not within Austria or has not yet been determined.	Section 577 para. 2 CCP: Sections 578, 580, 583, 584, 585, 593 paragraphs (3) bis (6), sections 602 and 615 shall also apply if the seat of the arbitral tribunal is not within Austria or has not yet been determined.	Section 577 para. 2 CCP: Sections 578, 580, 583, 584, 585, 593 paragraphs (3) to (6), sections 602, 612 and 614 shall also apply if the seat of the arbitral tribunal is not within Austria or has not yet been determined.
Section 577 para. 3 CCP: As long as the seat of the arbitral tribunal has not yet been determined, the Austrian courts shall have jurisdiction	Section 577 para. 3 CCP: As long as the seat of the arbitral tribunal has not yet been determined, the Austrian courts shall have jurisdiction for	Section 577 para. 3 CCP: As long as the seat of the arbitral tribunal has not yet been determined, the Austrian courts shall have jurisdiction for those

[42] Vienna International Arbitration Centre, *The English translation of the Austrian Arbitration Act (Sections 577-618 CCP) as amended by SchiedsRÄG 2013* (based on Stefan Riegler, Alice Fremuth-Wolf & Martin Platte, *Chapter 5*, in ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE at 805 et seqq. [Stefan Riegler et al. eds., 2007]), https://www.viac.eu/wp-content/uploads/2025/04/ZPO-Schiedsrecht-2014-en-im-VIAC-Layout.pdf (accessed December 9, 2025); the translations of the LBI Draft and the Ministerial Draft were based on the VIAC's translation.

for those judicial matters provided for in Sections 586, 587, 589, 590 and 591 if one of the parties has its ordinary place of jurisdiction within Austria pursuant to Sections 65 to 75 of the Law on Court Jurisdiction.	those judicial matters stipulated in the Third Title hereof if one of the parties has its seat, domicile or habitual residence within Austria.	judicial matters stipulated in the Third Title hereof if one of the parties has its seat, domicile or habitual residence within Austria.
Section 577 para. 4 CCP: The provisions of this Chapter shall not be applicable to arbitral tribunals according to the Austrian Act on Associations and Societies ("Vereinsgesetz") for the conciliation of disputes arising out of disputes within an association or society ("Verein").	Section 577 para. 4 CCP: The provisions of this Chapter shall not be applicable to panels according to the Austrian Act on Associations and Societies ("Vereinsgesetz") for the conciliation of disputes arising out of disputes within an association or society ("Verein").	Section 577 para. 4 CCP: The provisions of this Chapter shall not be applicable to panels according to the Austrian Act on Associations and Societies ("Vereinsgesetz") for the conciliation of disputes arising out of disputes within an association or society ("Verein").
Consumer protection provisions		
No comparable provision	Section 619 para. 1 CCP: Arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes that have already arisen.	Section 617 para. 1 CCP: Arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes that have already arisen.
The first and third sentences of Section 583 para. 5 CCP: Arbitration agreements to which a consumer is a party must be contained in a document signed personally by him. […] This document must not contain any agreements other than those relating to the arbitral proceedings; this shall not apply if the arbitration agreement was concluded in the form of a notarial deed.	Section 619 para. 2 CCP: Arbitration agreements to which a consumer is a party must be contained in a document signed personally by him. This document must not contain any agreements other than those relating to the arbitral proceedings; this shall not apply if the arbitration agreement was concluded in the form of a notarial deed.	Section 617 para. 2 CCP: Arbitration agreements to which a consumer is a party must be contained in a document signed personally by him. This document must not contain any agreements other than those relating to the arbitral proceedings.

No comparable provision	No comparable provision	Section 617 para. 3 CCP: In arbitration agreements between an entrepreneur and a consumer, the consumer shall, prior to concluding the arbitration agreement, receive written legal advice on the relevant differences between arbitral and court proceedings.
The second sentence of Section 583 para. 5 CCP: [...] In arbitration agreements between entrepreneurs and consumers, the seat of the arbitral tribunal must be stipulated. [...]	The first sentence of Section 619 para. 3 CCP: In arbitration agreements between entrepreneurs and consumers, the seat of the arbitral tribunal must be stipulated. [...]	The first sentence of Section 617 para. 4 CCP: In arbitration agreements between entrepreneurs and consumers, the seat of the arbitral tribunal must be stipulated. [...]
Section 584 para. 2 CCP: Where the arbitration agreement was concluded between an entrepreneur and a consumer, who has his domicile, habitual residence or place of employment in Austria, and where, either at the time of concluding the arbitration agreement or at the time when the action has become pending, the consumer did not have his domicile, habitual residence or place of employment in the country where the arbitral tribunal has its seat, the arbitration agreement shall only be effective if the consumer invokes it. Paragraph 1 shall apply accordingly.	Section 619 para. 4 CCP: Where the arbitration agreement was concluded between an entrepreneur and a consumer, who has his domicile, habitual residence or place of employment in Austria, and where, either at the time of concluding the arbitration agreement or at the time when the action has become pending, the consumer did not have his domicile, habitual residence or place of employment in the country where the arbitral tribunal has its seat, the arbitration agreement shall only be effective if the consumer invokes it.	Section 617 para. 5 CCP: Where the arbitration agreement was concluded between an entrepreneur and a consumer and where, either at the time of concluding the arbitration agreement or at the time when the action has become pending, the consumer did not have his domicile, habitual residence or place of employment in the country where the arbitral tribunal has its seat, the arbitration agreement shall only be effective if the consumer invokes it.
Section 595 para. 3 CCP: In an arbitration between an entrepreneur and a consumer	The second sentence of Section 619 para. 3 CCP: [...] The arbitral tribunal may only convene at a	The second sentence of Section 617 para. 4 CCP: [...] The arbitral tribunal may only convene

pursuant to Section 584 para. 2, the arbitral tribunal may only convene for an oral hearing or for the taking of evidence at a place different from that specified in paragraph 1 if the consumer has approved thereof after the dispute arose or if considerable difficulties hinder the taking of evidence at the seat of the arbitral tribunal.	different place for an oral hearing or for the taking of evidence, if the consumer has approved thereof, or if considerable difficulties hinder the taking of evidence at the seat of the arbitral tribunal.	at a different place for an oral hearing or for the taking of evidence, if the consumer has approved thereof, or if considerable difficulties hinder the taking of evidence at the seat of the arbitral tribunal.
No comparable provision	Second 619 para. 5 CCP: An arbitral award shall also be set aside if, in arbitral proceedings in which a consumer is involved, the applicant substantiates the assertion that 1. mandatory provisions of law were violated, the application of which could not have been waived by choice of law by the parties, even in a case with an international element, or 2. the prerequisites are met under which a court judgment may be appealed under section 530 paragraph (1) numbers 1-7 by means of an action for revision; in this case, the time period for the action for setting aside shall be determined in accordance with the provisions on the action for revision.	Section 617 para. 6 CCP: An arbitral award shall also be set aside if, in arbitral proceedings in which a consumer is involved, 1. mandatory provisions of law were violated, the application of which could not have been waived by choice of law by the parties, even in a case with an international element, or 2. the prerequisites are met under which a court judgment may be appealed under section 530 paragraph (1) numbers 6 and 7 by means of an action for revision; in this case, the time period for the action for setting aside shall be determined in accordance with the provisions on the action for revision.
No comparable provision	No comparable provision	Section 617 para. 7 CCP: Where the arbitral proceedings were conducted between an

		entrepreneur and a consumer, the arbitral award shall also be set aside if the consumer did not receive written legal advice as stipulated in paragraph (3).

One may glean the following from this comparison: the protective measures of Section 617 CCP were **significantly** expanded in the course of the legislative process. For example, the LBI Draft did not include a prohibition on *ex ante* arbitration agreements. That prohibition was first introduced in the Ministerial Bill (MB: Section 619(1) CCP) and was then adopted, unchanged, in the Government Bill (GB: Section 617(1) CCP).

The *travaux préparatoires* indicate that the Austrian legislature did not intend to introduce an additional prerequisite to an arbitration agreement's validity[43] but rather sought to limit the objective arbitrability of consumer disputes to disputes that had already arisen (so-called *ex post* arbitration agreements).[44]

[43] *But see* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 16, 2013, 6 Ob 43/13m (Austria); Koller, *supra* note 20, at 188 *et seq.*; Christian Koller, *3. Kapitel. Die Schiedsvereinbarung*, in SCHIEDSVERFAHRENSRECHT I para. 3/111 (Christoph Liebscher, Paul Oberhammer & Walter H. Rechberger eds., 2011); *see also* Aschauer, *supra* note 16, at 10, who argued that Sections 617(1)–(3) of the Austrian Code of Civil Procedure might be considered merely requirements of form, which Article II(3) of the New York Convention would consequently displace in cases involving a foreign seat of arbitration.

[44] This interpretation is supported by the identical wording in the explanatory notes to both the Ministerial Bill and the Government Bill; *see* Ministerialentwurf [ME] [Ministerial Bill] No. 280 Gesetzgebungsperiode [GP] 22, at 33–34 (Austria) and Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 30 (Austria): "Für den Bereich der Konsumenten wird dies im Wesentlichen durch **eine Beschränkung der objektiven Schiedsfähigkeit auf bereits entstandene Streitigkeiten zwischen Unternehmern und Verbrauchern in Abs. 1 einerseits** und eine der Warnfunktion verpflichtete besondere Formvorschrift in Abs. 2 für alle Konsumenten (also auch für Vereinbarungen zwischen Konsumenten) andererseits zu erreichen versucht." (emphasis added).
See also, in context of Section 582(2) CCP, Ministerialentwurf [ME] [Ministerial Bill] No. 280 Gesetzgebungsperiode [GP] 22, at 9 (Austria) and Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 8 (Austria): "Entsprechend der Regelung des letzten Satzes des Abs. 2 bleibt auch die Regelung des § 9 ASGG unberührt, wonach in Arbeitsrechtssachen nach § 50 Abs. 2 ASGG und in Sozialrechtssachen Schiedsvereinbarungen unwirksam sind und in Arbeitsrechtssachen nach § 50 Abs. 1 ASGG nur für bereits entstandene Streitigkeiten wirksam geschlossen werden können, sofern es sich nicht um Vereinbarungen mit Geschäftsführern und Vorstandsmitgliedern von Kapitalgesellschaften handelt. **Für Konsumenten ist in § 617 des Entwurfs eine differenzierte Lösung vorgesehen.** […]" (emphasis added).

With regard to the catalogue of annulment grounds in consumer arbitration, the Ministerial Bill (MB: paragraph 5) and the Government Bill (GB: paragraph 6) follow the approach of the previous Arbitration Act (as amended in 1983) and deviate from the less protective LBI Draft. The latter proposed limiting the catalogue of annulment grounds, **irrespective** of whether or not a consumer is involved.

Another novelty introduced by the Government Bill is the requirement that a consumer must be given written legal advice on the relevant differences between arbitral and court proceedings prior to entering into the arbitration agreement. The absence of such advice even constitutes additional ground for setting aside (GB: paragraphs 3 and 7). No comparable provisions were included in either the LBI Draft or the Ministerial Bill.

2. Analysis of the Key Protection Measures of Section 617 CCP

In the author's opinion, key consumer protection measures of Section 617 CCP are contained in paragraphs one, three and five. These are: i) the prohibition of *ex ante* consumer arbitration agreements (Section 617(1) CCP), ii) the mandatory written legal advice (Section 617(3) CCP) and iii) the restriction on the choice of the arbitral seat (Section 617(5) CCP). Austrian legislature sanctions non-compliance with Sections 617(1) and (5) CCP with ineffectiveness of the arbitration agreement and a non-compliance with Section 617(3) CCP with setting aside of award. As this subchapter demonstrates, the tension between Section 577(2) CCP and Sections 617(1), (3) and (5) CCP can, in the author's view, be resolved through statutory interpretation. Moreover, the legislative purpose of these three paragraphs requires them to be classified as either matters of objective arbitrability or public policy in the context of the New York Convention.

See also JENNY POWER, THE AUSTRIAN ARBITRATION ACT 127 (2006); Andreas Reiner, *SchiedsRÄG 2006: Wissenswertes zum neuen österreichischen Schiedsrecht*, ecolex 468, 468 (2006); Walter H. Rechberger & Werner Melis, *§ 582 ZPO*, in KOMMENTAR ZUR ZPO para. 4 (Walter H. Rechberger ed., 3d ed. 2006); Alexander Petsche, *Section 617*, in ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE para. 7 (Stefan Riegler et al. eds., 2007); *but see* FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA paras. 1-037 *et seq.* (2009), who classify Section 617(1) CCP as a limitation of the consumer's capacity to enter into an arbitration agreement and, therefore, as a question of subjective arbitrability; Mankowski, *supra* note 25, paras. 6.44 *et seqq.*, who classifies consumer protection provisions such as Section 617 CCP as a question of subjective arbitrability. However, the law applicable to subjective arbitrability of consumer disputes is the law of consumer's domicile ("Recht des Verbraucherwohnsitzes") instead of the law of consumer's nationality; *see also* Hartlieb & Oiwoh, *supra* note 24, para. 20/33 and Günther Horvath, Désirée Prantl & Brian S. Oiwoh, *Privatstiftungen und Schiedsverfahren in Österreich*, in USUS ATQUE SCIENTIA – FESTSCHRIFT FÜR RODERICH C. THÜMMEL ZUM 65. GEBURTSTAG 367, 378 (Rolf A. Schütze, Thomas R. Klötzel & Martin Gebauer eds., 2020).

Beginning with Section 617(1) CCP: Its wording treats all arbitration agreements equally. Section 617(1) CCP makes no distinction between arbitrations seated in Austria and those seated abroad ("Arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes that have already arisen."). Nothing in the wording of Section 617(1) CCP suggests that the level of consumer protection should vary depending on the seat of arbitration.

The legislature's explicit intention also supports treating domestic and foreign arbitration proceedings equally. As already mentioned, the legislature sought to limit the objective arbitrability of consumer disputes to those that have already arisen, as stated in Section 617(1) CCP. The very effectiveness of this protective mechanism depends on its classification as a matter of objective arbitrability, which must be safeguarded even in the context of foreign arbitral awards.[45] This would not be possible if Section 617(1) CCP were classified as a matter of contractual validity. Such a scenario would effectively shift protection of Austrian consumers from the Austrian legal system onto the foreign seat of arbitration and its local law, which in most cases offers a significantly lower level of protection (or no level of protection at all) than Section 617 CCP.[46] Lastly, consumer arbitration agreements are also restricted by Art 1(q) of Annex to the Unfair Terms Directive.[47]

Turning to Section 617(5) CCP, the study found that this provision, as proposed in the Government Bill, deviates from the LBI Draft and the Ministerial Bill in one respect: unlike these earlier versions, the wording adopted by the Federal Government does not refer to a domicile, habitual residence, or place of employment *in Austria* ("*im Inland*"); rather, it precludes all arbitration agreements that designate a seat of arbitration which differs from the consumer's domicile, habitual residence, or place of employment, unless the consumer expressly invokes them. The Government Bill employs neutral language, thereby expanding Section 617(5)'s scope of application. The explanatory materials to the

[45] *See* Art V(2)(a) of the New York Convention. A recourse to *ordre public* would thus appear unnecessary. For the classification of Section 617(1) CCP as a limitation on objective arbitrability, *see* POWER, *supra* note 44, at 127; Reiner, *supra* note 44, at 468; Rechberger & Melis, *supra* note 44, para. 4; Petsche, *supra* note 44, para. 7; *see also* GEORG KODEK & PETER MAYR, ZIVILPROZESSRECHT para. 1274 (6th ed. 2024), who suggest that the widely acknowledged objective arbitrability of B2C disputes is questionable ("*strittig*").

[46] *E.g.*, under Swiss law, *see* Herbst, Möhler & Widmann, *supra* note 5, paras. 660 *et seqq.*; for corporate law disputes, *see* Section 634(2) of the Code of Civil Procedure of the Principality of Liechtenstein.

[47] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29; *see also* Article 3 of the Unfair Terms Directive.

Government Bill differ only marginally from those to the Ministerial Bill, which referred exclusively to domestic consumers.[48] It would therefore be surprising – and difficult to explain – if the Government Bill had intended to suddenly exclude Austrian consumers if a foreign arbitral seat were chosen.[49] The very purpose of Section 617(5) CCP is to protect consumers from being compelled to accept a seat of arbitration with no meaningful connection to them.[50]

One might already resolve the tension between the reference provision in Section 577(2) CCP and Section 617(5) CCP on the basis of the wording (*see* Section 618(4) CCP in the Ministerial Bill: "[…] a consumer, who has his domicile, habitual residence or place of employment in Austria […]") and the legislative purpose of the Ministerial Bill. While less straightforward, the tension between the two provisions in the enacted version of the law can likewise be resolved by statutory interpretation – in particular, through historical interpretation and in consideration of the policy goals of the provision ("*teleologische Interpretation*").

The reason for the change in wording can be traced back to the consultation phase and, more specifically, to the Austrian Bar Association's opinion on the Ministerial Bill.[51] A closer examination of that opinion reveals that the wording was amended so that Section 617(5) CCP would **also** have the effect of protecting foreign consumers from being subjected to arbitration seated in Austria.[52] The relevant passage of the opinion reads as follows:[53]

> *"Section 619: The following additional consideration is proposed: A consumer who has neither domicile nor habitual residence in Austria should benefit from the stricter consumer protection rules of the state in which they are domiciled or habitually reside. This could help prevent undesirable arbitration tourism to Austria.*

[48] It is worth noting that the reference in the Ministerial Bill likewise contains no cross-reference to Section 619 CCP as proposed in that Bill.
[49] With regard to the LBI Draft, *see* OBERHAMMER, *supra* note 1, at 54 *et seq.* & 95; *see also* ZEILER, SIWY & HERBST, *supra* note 5, § 617 para. 6.
[50] *See* Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 30 (Austria).
[51] Österreichischer Rechtsanwaltskammertag [Austrian Bar Association] Gesetzgebungsperiode [GP] 22 Stellungnahme [SN] [Opinion] No. 18 on the Ministerial Bill No. 280, at 1 *et seqq.* (Austria).
[52] The scope of application of Section 617(5) of the Code of Civil Procedure, as currently in force, was thus expanded compared to the Ministerial Bill.
[53] Österreichischer Rechtsanwaltskammertag [Austrian Bar Association] Gesetzgebungsperiode [GP] 22 Stellungnahme [SN] [Opinion] No. 18 on the Ministerial Bill No. 280, at 13 (Austria) (unofficial English translation).

> *Moreover, the reverse situation under paragraph 4 should also be addressed. This provision should apply reciprocally when a consumer residing abroad enters into an arbitration agreement designating an arbitral tribunal seated in Austria."*

While the legislature did not include the first proposal in the final text of the law, it did adopt the second proposal, which addressed the "opposite scenario" (a foreign consumer in a domestic arbitration), by amending the wording. This by no means implies that the original scenario (a domestic consumer in an arbitration seated abroad) is excluded from the scope of application of Section 617 CCP.

This caused friction with the general referencing technique used in Section 577(2) CCP. However, in its opinion, the Austrian Bar Association advocated for a different approach: each individual provision should state whether a provision should also apply to arbitration proceedings seated abroad.[54] This would certainly have avoided the current uncertainty regarding the scope of application of Section 617 CCP.

It should also be noted that Section 577(2) CCP (as proposed in the LBI Draft) referred to all consumer protection provisions of Austrian arbitration law.[55] These provisions, which were initially scattered across the Fourth Chapter of the CCP in the LBI Draft, were consolidated into a single special provision in the Ministerial Bill (MB: Section 619 CCP). It thus seems very likely that the legislature simply forgot to modify the general reference provision after consolidating the consumer protection rules into one section. It is equally possible that the legislature did not consider it even necessary to refer to Section 617(5) CCP (or to Section 619(4) CCP as proposed in the Ministerial Bill), given the clear wording "a consumer, who has his domicile, habitual residence or place of employment in Austria".

As shown in this study, the Austrian legislature did not intend to exclude Austrian consumers from the scope of application of Section 617(5) CCP if a foreign seat were chosen. However, the effectiveness of Section 617(5) CCP in the context of international arbitration (pursuant to the NYC) will largely depend on its classification. Similarly to Section 617(1) CCP,[56] the purpose of Section 617(5) CCP

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[54] Österreichischer Rechtsanwaltskammertag [Austrian Bar Association] Gesetzgebungsperiode [GP] 22 Stellungnahme [SN] [Opinion] No. 18 on the Ministerial Bill No. 280, at 2 (Austria).

[55] *See supra* p. 76; *see also* OBERHAMMER, *supra* note 1, at 95.

[56] Its classification as a matter of objective arbitrability was not only explicitly intended, but it also – from a functional point of view – helps achieve the purpose of Section 617(1) CCP in the best way; *but see* Koller, *supra* note 20, at 189 *et seq.*, who argues that Section 617(1) CCP – from a structural

is best achieved if the said provision is classified as a matter of objective arbitrability (Art V[2][a] NYC) or public policy (Art V[2][b] NYC).[57]

Another intriguing aspect of the (alleged) applicability of Section 617 CCP solely to domestic arbitrations is the requirement of mandatory written legal advice under Section 617(3) CCP. As noted earlier, this provision stipulates that a consumer must receive written legal advice on the essential differences between arbitral and court proceedings prior to entering into the arbitration agreement. Failure to provide such advice constitutes a separate ground for setting aside an award pursuant to Section 617(7) CCP.[58] Both provisions were introduced by the Government Bill,[59] which implemented the Federal Chamber of Labour's amendments submitted during the consultation phase on the Ministerial Bill.[60]

Neither the wording nor the purpose of the mandatory legal advice indicates that Section 617(3) CCP should apply only if the seat of arbitration is in Austria. The

point of view – should rather be classified as a matter of contractual validity than one of objective arbitrability; *see supra* footnote 43.

[57] Section 617(5) CCP could – in the author's opinion, only partially – be safeguarded if it is classified as a matter of subjective arbitrability (Art V[1][a] NYC). This is for two reasons. First, Austrian courts do not examine questions of subjective arbitrability under the NYC on their own motion. An Austrian consumer would therefore have to request refusal of recognition and enforcement of a foreign award and demonstrate that his domicile, habitual residence, or place of employment did not correspond to a (foreign) arbitral seat. He would also have to show that he did not submit to arbitration without raising the issue of subjective incapacity under Section 617(5) CCP. The same applies *mutatis mutandis* to a potential classification of Section 617(1) CCP as a matter of subjective arbitrability. Second, as will be shown below, whether an Austrian consumer can conclude an arbitration agreement, and even more so an arbitration agreement which designates a foreign arbitral seat, depends on whether he received a mandatory written legal advice pursuant to Section 617(3) CCP. Ideally, the classification of Section 617(5) CCP should therefore be aligned with that of Section 617(3) CCP.

[58] An additional setting aside ground sanctioning violations of mandatory written legal advice does not mean that the same violations outside domestic context remain unsanctioned.

[59] No comparable provisions were included in either the LBI Draft or the Ministerial Bill; *see supra* II.C.1.

[60] Bundesarbeiterkammer [Federal Chamber of Labour] Gesetzgebungsperiode [GP] 22 Stellungnahme [SN] [Opinion] No. 16 on the Ministerial Bill No. 280, at 1 *et seq.* (Austria) ("Die Sonderbestimmung des § 619 ZPO ist zu begrüßen. Allerdings kann nicht ausgeschlossen werden, dass rechtsunkundige Verbraucher/innen für einen bestehenden Rechtsstreit eine Schiedsvereinbarung abschließen, ohne deren (finanzielle) Folgen einschätzen zu können. Die Bundesarbeitskammer schlägt daher vor, eine verpflichtende schriftliche Rechtsbelehrung über die wesentlichen, möglichen Abweichungen des schiedsgerichtlichen Verfahrens (kein Rechtsmittel, kein Kostenersatz, Kosten des Schiedsgerichtes) gegenüber einem Gerichtsverfahren vorzusehen.
Ein Verstoß gegen die Informationspflicht wäre angemessen – allenfalls als zusätzlicher Aufhebungsgrund – zu sanktionieren. […]") (in German).

reasons for this mirror the argumentation regarding Sections 617(1) and (5) CCP.[61] First, the wording of Section 617(3) CCP – taken alone – treats all arbitration agreements equally. Second, and more importantly, if Section 617(3) CCP were not applicable outside the domestic context when Austrian consumers were involved, this would result in unjustified unequal treatment of those consumers.

Furthermore, in the author's view, Sections 617(3) and 617(5) CCP are interdependent. As previously discussed, an arbitration agreement involving an Austrian consumer that designates a foreign seat becomes effective only if the consumer invokes it (see Section 617[5] CPC). However, Section 617(3) CCP prevents an Austrian consumer, by operation of law, from entering into **any (!)** arbitration agreement – including an agreement designating a foreign seat – without first receiving the mandatory written legal advice. The *travaux préparatoires* describe this requirement as an additional protective provision (in German: "*weitere Schutzvorschrift*").[62] However, the utmost importance of Section 617(3) CCP for an adequate consumer protection is well evidenced by Section 617(7) CCP. As previously mentioned, the latter provision stipulates that a violation of Section 617(3) CCP shall lead to the setting aside of an award.

In the author's view, the key to resolving the consumer arbitration enigma lies in the (functional) classification of Sections 617(1), (3), and (5) CCP. Ensuring the protection for Austrian consumers under the NYC requires these paragraphs to be classified as prerequisites for objective arbitrability of consumer disputes in Austria or as a matter of public policy.[63]

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[61] *See supra* p. 81 *et seqq*.

[62] Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 30 (Austria); however, the *travaux préparatoires* with regard to Section 582 CCP (objective arbitrability)

[63] For the classification as a matter of public policy, *see* Koller, *supra* note 20, at 189 *et seq.*; for the classification of Section 617 CCP as a matter of subjective arbitrability, which – from a structural point of view – might be the most suitable, *see*, *e.g.*, Mankowski, *supra* note 25, paras. 6.44 *et seq*. However, such a classification has several weaknesses (*see supra* footnote 57), which frustrate the purpose of Section 617 CCP. Therefore, the three said paragraphs of Section 617 CCP should – in the author's view – rather be classified (functionally) as either prerequisites for the objective arbitrability or as a matter of public policy. It is uncontroversial that the latter two concepts are defined by the Contracting States of the NYC and that they provide the Contracting States with a "safety-valve"; *see*, *e.g.*, David Quinke, *New York Convention, Article V(2)(a) [Objective Arbitrability]*, in NEW YORK CONVENTION: ARTICLE-BY-ARTICLE COMMENTARY paras. 421, 424 (Reinmar Wolff ed., 2nd ed. 2019).
For examples of functional classification, *see* Oberster Gerichtshof [OGH] [Supreme Court] Mar. 1, 2017, 5 Ob 72/16y, paras. 4.1 *et seqq*. (Austria) (classification of the indemnification and compensation of commercial agents after termination of the agency contract as a matter of public

It is undeniable that consumer protection laws did not exist – or at least not in the present form – at the time the NYC was drafted, and that its tools must somehow be aligned with the framework of the New York Convention. This situation is, however, not very different from other non-arbitrable disputes in Austria, such as those arising from contracts underlying the Austrian Tenancy Act ("*Mietrechtsgesetz*"), the Austrian Limited-Profit Housing Act ("*Wohnungsgemeinnützigkeitsgesetz*"), or the Austrian Condominium Law Act 2002 ("*Wohnungseigentumsgesetz* 2002"), where the legislature opted for a more convenient path and declared such disputes as non-arbitrable from the outset (*see* Section 582(1) CCP).[64]

In the context of consumer disputes, the approach taken by the legislature was more nuanced.[65] This explains why Section 617 CCP has proved rather complex and – according to prevailing views – ineffective in the context of international arbitration under the NYC.[66] As demonstrated earlier in this study, such an outcome cannot have been intended by the legislature, which substantially expanded consumer protection mechanisms during the drafting process.[67] If Section 617 CCP (and, particularly, its paragraphs 1, 3 and 5) were to apply only in the domestic context, Austrian consumers involved in an arbitration seated

policy; *see*, in particular, para. 7 [in German]: […] "Die Versagung der Anerkennung der Schiedsklausel verbleibt einzig als Möglichkeit, den international zwingenden Anwendungsbereich der Art 17 und 18 der HandelsvertreterRL zugunsten des Handelsvertreters abzusichern, dessen Schutz die genannten Richtlinienbestimmungen und der in deren Umsetzung ergangenen § 24 HVertrG bezweckt."); *see also* Oberster Gerichtshof [OGH] [Supreme Court] Apr. 3, 2024, 18 OCg 3/22y (Austria) (with regard to the validity of a shareholder resolution in a limited partnership under Austrian law ["*Kommanditgesellschaft*"]; Section 617 CCP was inapplicable because the arbitration agreement had been concluded before 2006); the Supreme Court classified the specifics of the arbitration agreement – such as the partners' participation rights in the arbitration proceedings – as a matter of objective arbitrability (in a rather functional manner). From a structural point of view, however, these questions could have been more appropriately classified as matters of public policy, *see*, *e.g.*, Lukas Wedl, *Neues zur Schiedsfähigkeit von gesellschaftsrechtlichen Beschlussmangelstreitigkeiten*, RECHT DER WIRTSCHAFT 457, 462 (2024) (procedural public policy) und Martin Trenker, *Schiedsfähigkeit von Beschlussmängelstreitigkeiten nach 18 OCg 3/22y*, NOTARIATSZEITUNG 286, 296 (2024) (substantive public policy).

[64] *See* Oberhammer, *supra* note 1, at 103, who draws attention to this inconsistency ("*Wertungswiderspruch*").

[65] *See* Erläuterungen zur Regierungsvorlage [Explanatory Memorandum] Nationalrat [NR] Gesetzgebungsperiode [GP] 22 Beilage [Blg] No. 1158, at 8 (Austria) (in context of Section 582(2) CCP).

[66] *See* already Oberhammer, *supra* note 1, at 101 *et seqq*.

[67] According to the legal literature, Section 617 CCP renders consumer arbitration in Austria practically impossible (*see supra* footnote 1). It is unclear why this should change if the seat of arbitration is moved abroad.

abroad would be left without adequate protection and, moreover, subjected to unjustifiable unequal treatment compared to their non-Austrian counterparts involved in an arbitration seated in Austria. There are no indications whatsoever that the legislature envisaged such a result.

III. Conclusion

Section 617 CCP does not fully achieve its intended purpose. It provides protection in situations in which no protection is required and, in some cases, is even undesirable, for example, in corporate law disputes and disputes concerning share purchase agreements. At the same time, its applicability to consumer arbitration agreements that designate a foreign arbitral seat is accompanied by significant legal uncertainty.

According to this study, the prevailing view in Austria – that Section 617 CCP does not apply if the arbitral seat is located abroad – does not withstand closer scrutiny. The tension between Section 577(2) CCP and Section 617 CCP can, in the author's view, be resolved through statutory interpretation. This study demonstrates that the three key provisions of Section 617 CCP must also be applied to arbitration agreements that designate a foreign seat of arbitration whenever Austrian consumers are involved. Only such an interpretation ensures that consumer protection cannot be circumvented by choosing a foreign seat of arbitration.

The effectiveness of the consumer protection granted under Section 617 CCP ultimately depends on its classification in the context of international arbitration under the NYC. Contrary to the prevailing view in Austria, Section 617(1) CCP was expressly intended to be classified as a matter of objective arbitrability. In the author's view, the protective mechanisms embedded in Section 617 CCP (in particular, paragraphs 1, 3, and 5) can achieve their intended purpose only if they are classified as matters of objective arbitrability or as part of the Austrian public policy framework. Such a (functional) classification is necessary to ensure that these provisions apply irrespective of the chosen arbitral seat and are duly considered by arbitral tribunals and Austrian civil courts.