

Consumer Arbitration in Europe

Gerold Zeiler/Nicolas Zenz

This article provides an overview of the regulations governing consumer arbitration in Europe. To that purpose we invited colleagues from various European countries to answer the following three questions for their respective jurisdiction:

- (i) May consumers validly conclude arbitration agreements?
- (ii) In case consumers may, in principle, conclude arbitration agreements, do any special rules apply to restrict consumer arbitration?
- (iii) In case special rules do apply to consumers, how is the term “consumer” defined in your jurisdiction for the purposes of such special rules?

The detailed answers given for each jurisdiction can be viewed in the following table. In summary, our survey demonstrates that consumer arbitration, in some way or other, is admissible in most European countries. However, while in certain jurisdictions little or no limitations apply to consumer arbitration (e.g. Switzerland), in the majority of European countries consumer arbitration is considerably restricted. For instance, in several jurisdictions a consumer may only conclude a valid arbitration agreement for disputes that have already arisen (e.g. Italy, Lithuania, and Poland). Another prerequisite for consumer arbitration that exists in multiple European countries is that the arbitration agreement is contained in a separate document that does not contain any terms other than those pertaining to the arbitration agreement (e.g. Croatia, Germany and Netherlands). In a few European jurisdictions consumer arbitration is completely prohibited (i.e. Bulgaria, Czech Republic and Hungary).

Country	May consumers validly conclude arbitration agreements?	In case consumers can, in principle, conclude arbitration agreements, do any special rules apply to restrict consumer arbitration?	In case special rules do apply to consumers, how is the term 'consumer' defined in your jurisdiction?	Legal sources	Author/ Law firm
Austria	YES	A consumer can only validly conclude an arbitration agreement if the following requirements are met: • The arbitration agreement was concluded after the dispute has arisen; • The arbitration agreement is contained in a document that is personally signed by the consumer; • This document does not contain any terms other than those pertaining to the arbitration agreement; • A written legal instruction on the major differences between arbitration and state court litigation is issued to the consumer; • The seat of arbitration is explicitly determined in the arbitration agreement; • In case the determined seat of arbitration is neither the consumer's domicile, place of ordinary residence nor place of employment, the arbitration agreement is only valid if the consumer relies on it.	Under Austrian law, every person – natural or legal – is a consumer if he/she conducts a legal transaction that is not made for his/hers commercial business. Even a person concluding preparatory transactions to establish a commercial business is still qualified as a consumer until the business is established. Only certain legal persons are qualified as entrepreneurs <i>ex lege</i> (e.g. GmbH, AG, SE). Other legal persons (e.g. partnerships or associations) can also be qualified as consumers. For example, pure holding entities are likely to be qualified as consumers.	Section 617 Austrian Code of Civil Procedure Section 1(1) Austrian Consumer Protection Act	Gerold Zeiler, Nicolas Zenz / zeiler. partners

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Austria (cont.)		Austrian law also knows additional reasons for setting aside an award against a consumer and stipulates certain special provisions for the setting aside proceedings of such awards.	Shareholders of a legal entity are only regarded to be entrepreneurs if they have a significant influence on the legal entity.		
Belgium	YES	In principle, no special rules apply to restrict consumer arbitration. However, as all consumer contracts, arbitration agreements concluded with consumers may be deemed invalid if they are " <i>unfair</i> " (i.e. creating a manifest imbalance between the rights and obligations of the parties to the detriment of the consumer). Most Belgian courts are prone to declare arbitration agreements with consumers invalid on this basis when: • The arbitration agreement was concluded before the dispute has arisen; and • The agreement does not offer the consumer a choice between pursuing a claim in arbitration or before state courts.	Under Belgian law, a consumer is defined as every natural person who acts for any purpose other than one related to his or her commercial, trade, craft or professional activities.	Art I.1, 2° and I.8, 22° Belgian Code of Economic Law (CEL) Art VI.83, 22° and 23° CEL (re businesses) and Art XIV/50, 22° and 23° CEL (re "free professions") Art XVI. 26/2 CEL	Nicolas Angelet / Liedekerke Wolters Waelbroeck Kirkpatrick

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Belgium (cont.)		Furthermore, specific rules pertaining to the validity of arbitration agreements with consumers have been incorporated in two pieces of legislation: (1) The Belgian law pertaining to the resolution of consumer disputes lists certain entities which may provide ADR to consumers. Dispute settlement by these entities can only lead to a binding decision, if: • The agreement was concluded after the occurrence of the dispute; • It does not deprive the consumer of his or her right to bring the dispute before national courts; and • The consumer was, individually and prior to the conclusion of the agreement, informed of the binding nature of the dispute settlement and explicitly accepted that binding nature. (2) The Belgian law on insurances stipulates that certain insurance contracts, further defined		Art 90 Belgian Insurance law of 2014	

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Belgium (cont.)		by the law, may not include arbitration agreements concluded before the occurrence of a dispute.			
Bulgaria	NO	Under Bulgarian law disputes with "consumers" are not arbitrable. Hence, any arbitration clause in a contract concluded between a consumer and an entrepreneur is invalid. Also arbitration awards rendered in proceedings in which a consumer was involved are null and void. In the course of the procedure for issuance of a writ of execution state courts are further obliged to inspect <i>ex officio</i> whether a consumer was party to the arbitration and if this was the case to refuse the issuance of a writ of execution. The law even provides for administrative liability and pecuniary sanctions for arbitrators and legal entities who participate in consumer arbitrations (the sanctions vary from approx. EUR 250 to approx. EUR 2,500).	Under the Bulgarian Consumer Protection Act a consumer is any natural person who acquires goods or uses services for purposes that do not fall within the sphere of his or her commercial or professional activity or who is party to a contract under the Consumer Protection Act acting outside his or her commercial or professional activity.	Art 19(1) and Art 405 of the Civil Procedure Code Art 3(4) and section 13 item 1 of the Additional Provisions of the Consumer Protection Act Art 47(2) and Art 53 of the International Commercial Arbitration Act	Metodi Baykushev, Pencho Stanchev, Martin Zahariev/ Dimitrov, Petrov & Co. Law Firm

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Croatia	YES	An arbitration agreement concerning a dispute which has already arisen or may arise out of a "consumer contract" is only valid if the following requirements are met: - the arbitration agreement is contained in a separate document signed by both parties (the law does, however, not require that the consumer personally signs the agreement); and - such document does not contain any terms other than those pertaining to arbitration. The above requirements do not apply if the consumer contract containing the arbitration agreement is drawn up by a notary public or if the content of such a contract has been verified by a notary public. For the arbitration agreement to be valid, it is not sufficient that only the signature of one or more parties has been authenticated by a notary public.	The term „consumer contract" is not defined in the Croatian Arbitration Act. Considering the Croatian legal system as a whole the expression should be understood as referring to any contract between, on the one hand, a consumer (as defined below) acting as the purchaser of goods or other assets or services and, on the other hand, a natural or a legal person acting as the seller or service provider within the scope of its business activities.	Art 6(6) Croatian Arbitration Act (NN 88/2001) Art 5(15) Croatian Consumer Protection Act (NN 41/2014, 110/2015)	Davor Babić / University of Zagreb

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Croatia (cont.)		An arbitration agreement in a consumer contract not complying with the above requirements is null and void. Following the wording of the law this applies regardless of whether it is the consumer or the entrepreneur who opposes arbitration. A more purposeful interpretation would lead to the conclusion that a consumer wishing to rely on the arbitration agreement may still do so, because the strict requirements concerning consumer arbitration only have the purpose of protecting consumers.	Thus, a contract whereby a consumer sells to a business entity (e.g. an SPA in which the seller is a natural person) is not a consumer contract for arbitration law purposes. Equally, a "C2C" contract is not a consumer contract. The Croatian Consumer Protection Act provides a general definition of a "consumer" as being any natural person concluding a legal transaction or otherwise acting in the market for purposes that are outside the scope of his or her commercial, business or professional activities.	Art 402(3) Croatian Obligations Act (NN 35/2005, 41/2008, 125/2011, 78/2015, 29/2018)	

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Croatia (cont.)			Various other statutes governing specific types of contracts, industries or commercial activities contain their own definitions of consumers (e.g. Electronic Commerce Act; Consumer Credit Act; Credit Institutions Act). In substance these definitions are not any different from the general definition found in the Consumer Protection Act.		
Cyprus	YES	Consumers are free to conclude arbitration agreements for the purposes of resolving any dispute arising out of or in connection to a contract they have concluded with a third party. Rather than restricting it, arbitration (and in fact also other alternative dispute resolution	The definition of 'consumer' under Cyprus law covers all natural persons who are acting outside their trade, business, craft or profession.		Melina Karaolia, Marios Eliades / Partners

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Cyprus (cont.)		mechanisms) is encouraged through a new national law enacted in 2017. Under this law, disputes arising between consumers (residing in Cyprus or another EU member state) and entrepreneurs located in Cyprus can be submitted to a national authorized ADR entity for resolution – in which case the consumer may opt for arbitration and thus validly conclude an arbitration agreement.			
Czech Republic	NO	An amendment to the Czech Arbitration Act, which took effect on 1 December 2016, declared all disputes arising from consumer contracts non-arbitrable under Czech law. Therefore, all arbitration agreements entered into between a consumer and an entrepreneur after 1 December 2016 are null and void. This is without a prejudice to the validity of arbitration agreements entered into between a consumer and an entrepreneur <i>before</i> 1 December 2016. Equally, arbitration proceedings initiated before 1 December 2016 are unaffected by the amendment to the Czech Arbitration Act.	Under Czech private law, a consumer is defined as <i>“any individual natural person who, outside his trade, business or profession, enters into a contract or has other dealings with an entrepreneur.”</i>	Section 2(1) Czech Arbitration Act Section 419 Czech Civil Code	David Seidl/ Squire Patton Boggs

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Denmark	YES	In principle, consumers may validly enter into arbitration agreements. However, an arbitration agreement in a contract to which one party is a consumer is not binding for the consumer if it is entered into before the dispute in question has arisen. In case a consumer was made aware of the non-binding nature of an arbitration agreement but nonetheless participated in the arbitration proceedings, the courts may hold that the consumer has waived its right to submit the invalidity of the arbitration agreement in subsequent enforcement or setting aside proceedings. Arbitration agreement concluded with a consumer may also be deemed invalid by the courts if the agreement is disproportionately burdensome to the consumer. Arbitration agreements contained in lease of property contracts for housing are always invalid.	An agreement to which one party is a consumer is defined as: <i>"An agreement which a commercial party concludes as a part of its business, when the other party (the consumer) is primarily acting outside of its trade/occupation"</i>. The commercial party bears the burden of proof that an agreement is not a consumer agreement.	Section 7 and 16 Danish Act on Arbitration Section 3 Danish Act on Consumer Agreements Section 38c of the Danish Contracts Act (implementation of Directive 93/13/EU Art 3(1)) Section 112a Danish Rent Act	René Offersen/ DLA Piper Denmark