REPUBLIK ÖSTERREICH
OBERSTER GERICHTSHOF

The Supreme Court, acting as the Court of Appeal, was represented by the President of the Senate, Dr Grohmann, as Chairperson, and the Court Councillors Hon.Prof. PD Dr Rassi, MMag. Sloboda, Dr Kikinger and Hofrätin Mag. Fitz as further judges in the case of the plaintiff Verein für Konsumenteninformation, Linke Wienzeile 18, Vienna 6, represented by Kosesnik-Wehrle & Langer Rechtsanwälte KG in Vienna, against the defendant L*, represented by Mag. Andreas Sabadello, lawyer in Vienna, for injunctive relief and publication of the judgment, on the defendant's appeal against the judgment of the Vienna Higher Regional Court as the court of appeal of 17 July 2023, GZ 1 R 50/23i-18, which dismissed an appeal by the defendant against the judgment of the Vienna Commercial Court of
22 February 2023, GZ 11 Cg 55/22h-11, was not upheld, the

O b j e c t i o n

summarised:

The appeal is dismissed.

The defendant is obliged to reimburse the plaintiff for the costs of the appeal proceedings totalling EUR [redacted] (including EUR [redacted] VAT) within 14 days.

Objection:

[1] The plaintiff is an association authorised to bring an action pursuant to Section 29 (1) KSchG.

[2] The defendant concludes contracts via a website operated by it by way of registration and uses contract forms with a large number of standardised contract clauses. The overwhelming majority of persons who enter into such a contractual relationship with the defendant have never previously been entrepreneurially active, received income exclusively from employment and pursued private investment purposes. Contractual relationships with such persons are not rejected by the defendant.

[3] The **plaintiff** seeks - based on Section 28 KSchG in conjunction with Section 879 (3) ABGB, Sections 6 and 10 (3) KSchG - to prohibit the defendant from, in the course of trade with consumers in clauses or clauses with the same meaning in business dealings with consumers in general terms and conditions or contract forms used by the defendant. He also requested the publication of the judgement.

[4] The **court of first instance** granted the application in full.

[5] The **Court of Appeal** confirmed this decision with the proviso that it restricted the application for an injunction to business dealings with consumers domiciled in Austria. It allowed the ordinary appeal because, in particular, the clauses contained in the remuneration plan were not recognised by the Supreme Court.

Court of Justice have not yet been dealt with, but these are important for a larger number of customers.

[6] The defendant's appeal on points of law is not admissible, contrary to the ruling of the Court of Appeal, which is not binding on the Supreme Court (Section 508a (1) ZPO).

[1. the Supreme Court is not called upon to interpret terms and conditions clauses "in any case", but only if the second instance has disregarded principles of supreme court case law or if questions of importance for legal unity and legal development are to be resolved (RS0121516). Accordingly, the mere fact that there is a lack of supreme court case law on the same or similar clauses is not sufficient for an appeal to the Supreme Court (RS0121516 [T4]). The mere fact that in the specific case several persons have concluded contracts with the defendant that contain similar clauses does not constitute a legal question of considerable importance within the meaning of the § Section 502 (1) ZPO (RS0042816 [T1]).

[8] The defendant alleges substantial questions of law on the following issues:

2. consumer transactions - § 1 para 1 and 3 KSchG:

[9] Insofar as the defendant questions the conclusion of contracts (also) with consumers or the existence of formation transactions pursuant to Section 1 (3) KSchG and therefore the applicability of the first main part of the KSchG, it departs from the established facts (summarised above), so that in this context alone no legal question of the quality of Section 502 (1) ZPO is raised. Whether even unilaterally binding continuing obligations

formation transactions within the meaning of Section 1 (3) KSchG, which open up the scope of application of the first main section, does not need to be clarified because - based on the established facts of the case - the conclusion of contracts predominantly "private" investment purposes and not the preparation of a company.

3 "Compensation plan":

[10] In connection with the violation of the clauses regulating the remuneration plan (22 to 43 as well as 45 and 46) against the transparency requirement of Section 6 (3) KSchG, which was affirmed by the Court of Appeal, the appeal is exhausted in the identical repetition of its appeal statements without even addressing the arguments of the Court of Appeal with a single word, so that there is no lawful legal complaint (see 1 Ob 51/19k point 7.; 10 Ob 53/22z para. 38), which could open up a review of the legal assessment of the Court of Appeal.

[According to case law, however, the lack of transparency of these clauses also leads to the invalidity of clauses 1, 4, 5, 6 and 10 referring to the remuneration plan (RS0122040 [T31]).

[5. also in connection with the provisions on the protection of business and trade secrets (clauses 8 and 9), which the Court of Appeal classified as grossly disadvantageous pursuant to § 879 para. 3 ABGB, the appeal does not show any misjudgement that is to be challenged.

[13] When assessing a gross disadvantage pursuant to Section 879 (3) ABGB, it must first be examined whether there is a deviation from the dispositive law

(RS0014676). In principle, business and trade secrets obtained in good faith are only protected against unfair exploitation (see §§ 26c and 26d UWG; RS0078348 [T6]). However, the defendant is not able to demonstrate a factual justification for the general prohibition of disclosure beyond the term of the contract, as the most customer-hostile interpretation also covers, for example, the free disclosure to family members or the disclosure to legal representatives for the examination and enforcement of claims of the customer (cf. 4 Ob 184/18i clause 3.2 [clause e1]). The violation of Section 879 (3) ABGB affirmed by the Court of Appeal is in line with the case law of the Supreme Court, against which the appeal does not cite any relevant arguments.

[6. the Court of Appeal, in connection with clause 11 (possibility of cancellation of the Marketer Agreement due to repeated, in the event of repeated incorrect advice indicated by above-average contestation, cancellation or termination of the brokered contracts at the next possible date) because circumstances over which the contractual partner of the defendant had no influence and which were not attributable to its sphere of influence would also entitle it to an extraordinary termination of the contract. Furthermore, the clause is intransparent because it remains unclear what is meant by "repeated" incorrect advice and an "above-average" number.

[15] The appeal contests the independently viable auxiliary reasoning of the Court of Appeal that the clause also does not violate Section 6 (3) KSchG, so that for this reason alone no significant legal question is raised (RS0118709 [T3]).

[7. the appeal does not show that the Court of Appeal applied the principles of the transparency assessment of Section 6 (3) KSchG or the case law of the Supreme Court on Section 6 (1), Section 10 (3) KSchG or Section 879 (3) ABGB in connection with the other clauses in need of correction.

[8. the alleged deficiencies in the appeal proceedings were examined and are not present (section 510 (3) ZPO).

[The appeal does not contain any comments on the time limit for performance and the request for publication. Overall, therefore, no significant legal question of the quality of Section 502 (1) ZPO is raised.

[19] 10. the decision on costs is based on §§ 41, 50 ZPO. The plaintiff has pointed out the inadmissibility of the appeal.

Supreme Court of
Vienna, 21 November 2023
Dr G r o h m a n n
The head of the business department is responsible for the correctness of the copy: