

Banking - Austria

Supreme Court rules definitively on bank guarantee and parallel recourse

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In a recent case of a bank guarantee drawn without legal cause, the Supreme Court granted the party on whose account the guarantee had been issued parallel recourse claims against both the beneficiary of the guarantee and the debtor whose payment obligation was meant to be discharged by the payment under the guarantee.

Facts

In order to provide a borrower with sufficient credit to enter into a loan agreement with the lender, the plaintiff instructed its bank to issue a bank guarantee securing repayment of the loan. When the borrower failed to pay several instalments, the lender drew the bank guarantee, despite the fact that this was not in compliance with the terms agreed with the plaintiff. The issuing bank had to pay the guarantee amount under the terms of the guarantee, irrespective of the fact that the applicable conditions stipulated between the plaintiff and the beneficiary had not been fulfilled, and debited the plaintiff's bank account for reimbursement. The plaintiff did not object to the issuing bank's reimbursement as the issuing bank had to honour the guarantee under its terms and subsequently filed a claim for repayment against both the beneficiary/lender and the borrower.

Decision

Based on an exhaustive analysis of available case law and legal writing on the topic, the Supreme Court concluded that the plaintiff had parallel recourse claims against both the beneficiary/lender that received the guarantee payment on grounds of unjust enrichment and the borrower whose payment obligations were (temporarily) discharged on grounds of reimbursement for expenses incurred.

The Supreme Court's authoritative opinion decides a long-lasting dispute that followed from contradictory case law. Contrary to a Supreme Court judgment rendered in 1990 and the view of a number of Austrian scholars, the Supreme Court explicitly rejected the argument that a claim for expenses incurred is valid only if the debtor's obligations are finally discharged thereby (which did not happen in the case at hand, as the beneficiary had to return the money it had received through illicit use of the guarantee). Apart from a specific interpretation of the relevant provision, whereby it suffices that the payment could have discharged the debtor's obligation, the Supreme Court took the view that, from a practical perspective, concurring claims were preferable: by means of a single payment by the borrower to the plaintiff, two debts could be settled instead of making a 'detour' of two separate payments (from the beneficiary/lender to the plaintiff and the borrower to the beneficiary/lender).

The claim of a third party against the party whose obligation should have been discharged is limited to the amount of such possible discharge (which were only the outstanding instalments under the loan, less the guarantee amount), whereas the claim against the beneficiary making illicit use of the guarantee is for the full amount drawn under the guarantee.

Comment

From a practical perspective, the Supreme Court's judgment is of particular relevance in a scenario where illicit use of a guarantee occurs and the party whose obligations are secured by the guarantee has deeper pockets than the beneficiary. In such a case, the judgment provides a solid legal basis for a claim directly against the obligor up to the amount due to the beneficiary.

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