Banking - Greece

Defining a 'consumer' under the Consumer Protection Law

Contributed by Kyriakides Georgopoulos & Daniolos Issaias

September 30 2011

Authors

Anthony Hadjioannou

Aggeliki Moutafi

Introduction

According to Article 1(4) of the Consumer Protection Law (2251/1994) (as amended by Law 3587/2007), a 'consumer' is considered to be any natural person or legal entity to which a product or service offered on the market is addressed. The person or legal entity deemed to be a consumer in this sense should make use of the product or service, provided that it constitutes the end user of such product or service.

Whether a particular consumer is subject to protection under Law 2251/1994 depends on the circumstances and factual background of each particular case. In each case, a person or entity is declared to be a consumer (or not otherwise a consumer) based on two criteria:

- the power of the supplier to negotiate with the person or entity; and
- the possibility of abusive use of legal protection by the particular person or entity.(1)

The substantive criterion in order for a person or entity to be deemed a consumer, and thus able to enjoy the protection of the law, is whether the particular user of the product or services is professionally involved in the supply of the product or service. The end user of the product should not be professionally involved in supplying products or services. Consequently, it should not repeat transactions of a particular kind and should not have obtained knowledge, experience or specialist negotiating ability in comparison to the supplier.(2) Accordingly, in order to outline and limit the definition of a 'consumer', the protective scope of the law should be taken into consideration – that is, the need to protect the consumer where it is the weaker contracting party.(3)

Facts

The plaintiff – who claimed to be a housewife – and her husband – a businessman engaged in international transactions – conducted long-term transactions with the defendant – a Swiss-based bank – which, as well as carrying out common banking transactions, was active in portfolio management and modern banking products. The plaintiff opened two bank accounts in order to deposit her own money and invest in securities (eg, bonds and shares), while appointing her husband as her proxy to manage her portfolio. Some time thereafter, the plaintiff decided to borrow additional funds from the bank in order to proceed with further investments and securities transactions, and offered as security a pledge over her accounts and the securities and investments which she acquired from the loan proceeds. In other words, the plaintiff entered into a combination of credit agreements (with a right to overdraw) and pledge agreements with the bank. The purpose of such borrowing was to use the credit amounts for systematic, long-term and repeated speculation through the purchase of securities on the international stock markets; as admitted in the lawsuit, the exclusive purpose of the loans was to carry out investment activities (ie, to purchase shares, bonds and precious metals). This type of loan, having investment as its object, is known as 'leverage'. This means that the money borrowed by the investor will be used as a lever to maximise profits.

According to the plaintiff's claims, such leverage entailed no risks to her own funds deposited in the bank. She entered into two loan agreements, while in both agreements it was agreed that as security, any debt balance of the accounts should be covered by the assets pledged in favour of the bank. In both the loan agreements and the pledge agreements, the parties submitted any disputes to the jurisdiction of the

Swiss courts and selected Swiss law as applicable law.

Furthermore, although the plaintiff admitted that she had not assigned the management of her portfolio to the bank, she claimed that the bank did not notify her of the risks that such investments entailed, and that throughout the transactions, the bank did not provide her with adequate information about the investment of her portfolio. The plaintiff further alleged that the bank sent her only the accounts statements, which did not include the actual value of her portfolio and accounts, which had sustained damages amounting to several million dollars. In addition, she claimed that the bank, despite being aware of the actual state of her accounts, intentionally withheld the truth and that due to the above allegedly erroneous and misleading information, she entered into the aforementioned loan agreements, as well as entering into two loan extensions based on her belief that the accounts had not sustained any damage. Moreover, she claimed that as a result of the two loan extensions, her credit limit was increased. When the bank requested additional security to cover its exposure, the plaintiff claimed that she was then notified for the first time of the damage sustained and refused to offer additional security. The bank The bank called in the pledges, but there was still a balance due to it in the amount of several million dollars..

The plaintiff knew that the bank would commence proceedings against her before the Swiss courts in order to pursue its claims, so she filed a lawsuit with the Greek courts seeking the issuance of a negative declaratory order to confirm that she owed nothing to the bank. In her attempt to establish the jurisdiction of the Greek courts, she claimed that she was a 'consumer' in her transactions with the bank and the bank was a service provider to her.

Decision

Both the first instance court and the appeal court dealt with the preliminary issue of whether the plaintiff was a 'consumer', as this was crucial for the deviation from the agreed jurisdiction of the Swiss courts and the establishment of the jurisdiction of the Greek courts under Article 14 of the Lugano Convention (ratified by Law 2460/1997). Both courts considered that the plaintiff has never acquired the status of a consumer and rejected the lawsuit. Following a petition for cassation filed by the plaintiff, the Supreme Court heard the case and ratified the judgment issued by the Court of Appeals. The Supreme Court examined whether the plaintiff could be characterised as a consumer in order to move the case to the Greek courts. According to the court, the plaintiff could not be considered to be a consumer and therefore could not bring the case before the courts of the consumer's place of residence (ie, the Greek courts).

According to the Supreme Court judgment:

"*in banking as well as investment transactions, which are addressed to the general public, such as bank deposits, or even mutual funds and investments in shares on the stock exchange market, any person can be involved as a consumer, without acting professionally, having no expert knowledge in this particular sector, even though necessarily the individual can expect to make profit. The criterion of profit expectation is not able to affect the individual as a consumer, since this expectation is inherent in all financial transactions. Without this profit expectation the individual would not carry out the transaction. There is a distinction however where the ultimate user of the service or product does not enjoy the product of the banking transaction as an individual but uses the product for his benefit needs. In this way, the trader who borrows money from the Bank in order to finance his imports is not a consumer of the loan, even though he is the ultimate user of the Bank service, since this loan is used for his commercial activities. The same applies to the professional who borrows money to promote his professional activities or his professional facilities. Any link between the product or the service and the professional activity is enough to exclude the status of 'consumer' under the above meaning... A person borrowing money from a Bank, whatever form the loan takes, in order to purchase stock exchange products or foreign currency, not in order to save these products or to use them to meet his living expenses or requirements, but for immediate sale and thereafter for speculation on the international shares or currency markets with their fluctuating prices, is not, as far as his relationship with the lender Bank is concerned, a consumer of the Bank's services.*"

In addition, and in accordance with the ruling of the Supreme Court, the investment strategy of leverage:

"*is exceptionally risky and therefore in the case of successful management... the investments can be very profitable. Where the investments from the loan progress positively, profits are made by not using her own capital, but by reinvesting, after a successful outcome, the difference between the return of the money borrowed and the interest paid to the lender Bank. However, this strategy is rather risky, since if the investor losses a part or the sum of his capital borrowed for his investments, he will have to pay back the Bank both the amount of the capital borrowed as well as the interest. Therefore, 'leverage' means borrowing money from the Bank for further disposal for the purpose of systematic profit and is not a strategy used for the investment of personal savings. Furthermore, in case the investor does not enter into a portfolio management*

agreement with the Bank, the risk of the leverage entirely depends on the options of this particular investor, who has the absolute initiative to carry out actions in order to make profit. However, he is subject to the fluctuating prices on the basis of circumstances beyond his control, such as future developments into which, per common sense, he is not able to penetrate, as well as the economic forces of currency or shares markets."

However, according to the plaintiff's admissions:

"*she had not signed any portfolio management agreement with the defendant and so she herself, through her proxy, proceeded with transactions for the sale and purchase of shares on international stock exchange markets, using money drawn from the defendant bank, by virtue of the above leverage agreement. She (or her above proxy) had the absolute initiative and control of her investment choices. This means that she had incorporated the above transaction in the framework of a systematic (professional and not private) profit activity, regardless of whether she was formally in charge of the household or whether these transactions were indications of mere specialist knowledge and skill, characteristics however not equating with the status of 'consumer'.*"(4)

Furthermore, the court ruled that this was:

"*not a case of the ultimate consumer acting in private, not having any involvement in commercial or professional activities in using the services of the defendant bank... On the contrary, the plaintiff systematically sought profit by the use of this money, 'acting professionally' as businessman, and through leverage she was able to continue her aggressive market speculation. The credit agreements between the plaintiff and the defendant, as well as the various pledge agreements between them did not aim at 'covering the plaintiff's own consumer needs', since... these amounts, which were borrowed by the plaintiff, were not used to cover her personal needs.*"

Therefore, the Supreme Court considered that the plaintiff had never acquired the capacity of a consumer and thus the Greek courts lacked international jurisdiction to rule on the case. According to the ruling, the Swiss courts have exclusive jurisdiction for disputes between the plaintiff and the bank, while the lawsuit is considered to be inadmissible due to a lack of international jurisdiction of the Greek courts.

Comment

Before granting the protection provided by the Consumer Protection Law, it is standard practice for the Greek courts to examine first whether a plaintiff qualifies as a consumer, taking into account the criteria mentioned above. To prove that a person or entity is a consumer (ie, an individual or entity which is not involved in commercial or professional activities), the court should take into consideration the position of the party in each particular agreement, in relation to the nature and object thereof. Consequently, only agreements which are executed in order to satisfy the consumption needs of a person on a private level fall within the scope of the provisions protecting the consumer as the weaker party from a financial point of view.(5)

By finding that the plaintiff was not a consumer, the Supreme Court enforced the lack of international jurisdiction of the Greek courts due to the existing forum selection clause in favour of the Swiss courts.

For further information on this topic please contact Anthony Hadjioannou *at Kyriakides Georgopoulos & Daniolos Issaias by telephone (+30 210 8171 500), fax (+30 210 6856 657-8) or email (*a.hadjioannou@kgdi.gr*).*

Endnotes

(1) See Prof Ioannis K Karakostas, *Consumers' Protection Law (Law 2251/1994, as it is in force following Law 3587/2007)*, 2008 edition, pages 79-80.

(2) In the framework of interpretation of Article 13 of the Brussels Convention, the European Court of Justice has ruled that a person who enters into an agreement for use, which is partially related to his or her professional activity, cannot be deemed to be a 'consumer' unless the link between such agreement and his or her professional activity is so poor that it plays a negligible role in the framework of the transaction for which the agreement was executed (see Prof Ioannis K Karakostas, *Consumers' Protection Law (Law 2251/1994, as it is in force following Law 3587/2007)*, 2008 edition, page 80 with further referrals).

(3) See Karakostas, *Consumers' Protection Law (Law 2251/1994, as it is in force following Law 3587/2007)*, 2008 edition, pages 80-82.

(4) In other words, she made investments as part of systematic profit activity.

(5) See Karakostas, *Consumers' Protection Law (Law 2251/1994, as it is in force following Law 3587/2007)*, 2008 edition, pages 488, with further referrals.

Online Media Partners