

Case law

Case Details

National ID: I ZR 171/97

Member State: Germany

Common Name:link

Decision type: Other

Decision date: 24/11/1999

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Package Travel Directive, [Article 2, 2](#). Package Travel Directive, [Article 7](#)

Headnote

1. In terms of determining whether a supplier is a tour operator as per § 651k BGB, it is immaterial whether the supplier provides the contractual services directly or whether he uses another service provider to do so.

Facts

The defendant, a Dutch company headquartered in Rotterdam, manages, inter alia, holiday parks in Germany (which it calls “C” parks). In these parks, the company offers short-term family holiday accommodation with additional services included in the price. It also advertises its services in brochures (eg the brochure entitled “C short family holidays 94/95”). A holiday in a “C” park can be booked directly from the defendant via a booking terminal in Cologne or in travel agencies. On receiving the booking confirmation, the defendant requests a pre-payment of 10% of the total trip price. The outstanding sum is generally due on receipt of the travel documents. The defendant does not issue customers who have booked a holiday in a “C” park with guarantee certificates as per § 651k para 4 BGB.

As per the case filed against the company, the Frankfurt Regional Court (LG Frankfurt am Main RRA 1996, 255) ordered the defendant, with the threat of penalties outlined in greater detail, to: (1) refrain, in its commercial dealings aimed at competing for holidaymakers for the “C” short family holidays as per the 94/95 brochure (as detailed in attachment K 1 of the case documentation), from requesting and/or accepting pre-payments of 10% of the total trip price where the customer has not received a guarantee certificate as per § 651k para 4 BGB or an equivalent guarantee in terms of § 651k para 5 BGB; and (2) to pay the plaintiff 267,50 DM plus interest. The defendant lodged a successful appeal with the Court of Appeal, which rejected the initial claim.

Legal issue

The Court of Appeal considered the plaintiff’s application for an injunction order to be unjustified, because the defendant was not legally obliged to provide a guarantee certificate under § 651k BGB. As such, the defendant was not in breach of § 1 of the Unfair Competition Act, UWG (now § 3 UWG w/e/f 2004) if it did not provide travellers with a guarantee in line with the aforementioned provision. The Court of Appeal had argued that the defendant was not a tour operator as per §§ 651a-651l BGB, as the defendant ran the “C” parks itself. Hence, the contract was not a travel contract as defined in §§ 651a-651l BGB, but rather a rental contract for holiday accommodation. As such, there was no obligation to provide guarantees.

The BGH did not concur with Court of Appeal’s view. It held that the defendant was a tour operator as per § 651k BGB if it concluded contracts in accordance with its holiday range as mentioned in the case documentation, even if it performed the services itself (ie acted as service provider).

Since the provisions §§ 651a-651l BGB governing travel contract law do not contain a definition of the term “tour operator”, the BGH ruled that the term was to be interpreted in accordance with the Council’s Package Travel Directive 90/314/EEC. It cannot be deduced – either from the legal definition contained in art 2 para 2 or from any other provisions in the Package Travel Directive – that the consumer protection provided for by the Directive should be dependent on the fact that the trip organiser does not himself provide typical package travel services like transport, accommodation and other tourist services that are not merely additional services within the context of transport and accommodation (art 2 para 1 of the Package Travel Directive), but rather either fully or partially contracts out the provision of these services to another company. This is also in line with the spirit and aim of the provision. The obligation to provide guarantees as per art 7 of the Directive is aimed at ensuring adequate safeguards are in place when a customer makes an advance payment for package tours. This obligation also applies where the customer books his holiday through a tour operator who then provides the services directly (ie acts as the service provider).

The BGH therefore ruled that, in accordance with the terms of reference laid down in the Package Travel Directive, the party who, in entering into a package travel contract with a customer as per art 2 para 1 of the Directive, pledges to take full responsibility for the performance of all travel services is to be regarded as a tour operator as per §§ 651a ff. BGB.

In the BGH’s opinion, the defendant was consequently to be regarded as the tour operator as per §§ 651a-651l BGB. The “C” short family holiday provided by the defendant as part of its holiday range constituted a package tour as per art 2 para 1 of the Package Travel Directive. This was because, as well as providing holiday accommodation, the defendant also offered a variety of other services, which could be seen simply as supplementary to the accommodation. This is based on the natural conclusion that would be drawn by the average customer, ie that the facilities and sporting options described in the brochure would be assumed to form part of the range of services provided by the defendant on a “C” park holiday.

For this reason, the BGH viewed the injunction request as justified and upheld the appeal.

Decision

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