

## Rechtsprechung

### Rechtssachenbeschreibung

**Nationale Kennung:** X ZR 17/01

**Mitgliedstaat:** Deutschland

**Gebräuchliche Bezeichnung:** N/A

**Art des Beschlusses:** Sonstiges

**Beschlussdatum:** 16/04/2002

**Gericht:** BGH

**Betreff:**

**Kläger:**

**Beklagter:**

**Schlagworte:** Rechtsprechung Deutschland Deutsch

### Artikel der Richtlinie

Package Travel Directive, [Article 2](#), 4. Package Travel Directive, [Article 7](#)

### Leitsatz

1. „Reisender“ i.S. von §§ 651a, 651k BGB kann auch ein Unternehmen sein, das als Vertragspartner des Reiseveranstalters Reisen als Verkaufsförderungsinstrument und damit zu gewerblichen Zwecken bucht, um die gebuchten Reiseleistungen Dritten zu Urlaubs- und Erholungszwecken zuzuwenden.
2. Bei einem vorliegenden Anspruch aus einem Zahlungsverprechen gem. § 651 k Abs. 1 BGB hat der Kundengeldabsicherer darzulegen und zu beweisen, dass die Reiseleistung auch ohne die Zahlungsunfähigkeit oder Eröffnung des Insolvenzverfahrens über das Vermögen des Reiseveranstalters ausgefallen wäre.

### Sachverhalt

The claimant distributes products for domestic animals. In the context of an advertising promotion it planned to give away 20 coach tours to selected customers. Accordingly, in mid-March 1998 it booked 20 coach tours of 14 days duration to commence between the 14th and the 16th of June 1998 with the travel agent F. The tours included a visit to the world cup football match between Germany and the USA. The claimant reserved itself, with the agreement of F, the right to name the 20 travellers at a later point in time. On 11.5.1998 the claimant paid the cost of the tours. It received 20 security certificates issued by the respondent, which inter alia confirmed the security for the refund of travel payments made in accordance with the contract in the event of non-performance. By letter of 19.5.1998 the claimant notified F the names of the 20 travellers. By letter of 10.6.1998 F informed the claimant that it had not received the entry tickets for the football match from its ticket agency and therefore had to cancel the trip. The LG (Landgericht – district court) Münster entered summary judgment against F to repay the travel package price with interest to the claimant. The payments did not occur. On 7.10.1998 F applied for bankruptcy.

The claimant seeks inter alia repayment of the travel price from the respondent insurers. The LG dismissed the claim. The BerGer (Berufungsgericht – court to which appeals on points of fact and law are submitted) allowed the appeal. The respondent's Revision (appeal on points of law) was unsuccessful.

### Rechtsfrage

### Entscheidung

The BGH (Bundegerichtshof – Federal Supreme Court) followed the judgment of the BerGer for the most part. The latter recognised that the respondent provided security in the event of insolvency in respect of the 20 travel packages through the issue of the security certificates and that the event insured occurred when the travel organiser became unable to pay. The claimant's case for return of the travel price paid was thereby founded.

The BGH did not however follow the view of the BerGer, according to which the respondent was also liable by virtue of the security certificates to refund of the travel package price even if the travellers in respect of whom the claimant was given security certificates by the travel organiser should not have been insured at all. The BGH stated that the respondent, by the text and description of the security certificates, made express reference to § 651k BGB and thereby made clear that it assumed the risk of insolvency for such travel packages, for which the customer's money was to be protected by a separate fund. Thus, it is clear, that the respondent, as hedger of customers' money, only assumed the risk in respect of travel services for which insurance is mandatory. This is however immaterial in the present case, as it concerns a travel contract within the meaning of § 651a (1) BGB and thus a travel service for which insurance is mandatory. The BGH reasoned the existence of such a travel package by stating that the travel organiser F was in any event liable for the coach journey and the accommodation. Furthermore, the claimant is to be regarded as "traveller" within the meaning of §§ 651a, 651k BGB, as "traveller" within the meaning of these provisions is the contractual partner of the travel organiser, who books a travel service in its own name and/or for others, whether or not it takes the service itself or books it for third parties. This also applies for a business.

This interpretation is also confirmed by Art. 2 (4) of the Directive of the Council of 13.7.1990 on travel packages, as it is also not a requirement there that the "main contracting party" takes the travel service itself. The term consumer in Art. 4 (2) of the Package Travel Directive does not contain the precondition in other consumer protecting directives and § 13 BGB of conclusion of contract outwith a self employed professional or business activity and thereby practically extends to all customers of a travel organiser.

On the assessment of the burden of proof, the BGH stated that initially the traveller, who makes a claim against the hedger of customers' money from a promise of payment made within the framework of § 651k (1) BGB has to establish and prove the existence and the materialisation of the claim. If the traveller fulfils this requirement, then it is incumbent on the hedger to establish and prove that the travel service would have failed also in the absence of the travel organiser's inability to pay or commencement of bankruptcy proceedings. § 651k BGB, just as Art. 7 Package Travel Directive, aims to provide complete protection of the rights of the consumer named in these provisions and thereby the protection of the consumer against all risks which result from the travel organiser's inability to pay. In the present case the respondent has not established that the travel service would also not have occurred in the absence of the travel organiser's inability to pay, the respondent therefore has to refund the travel price to the claimant.

Volltext: [Volltext](#)

### Verbundene Rechtssachen

Keine Ergebnisse verfügbar

**Rechtsliteratur**

Keine Ergebnisse verfügbar

**Ergebnis**