

Case law

Case Details

National ID: VIII ZR 375/03

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 03/11/2004

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Distance Selling Directive, [Article 1](#) Distance Selling Directive, [Article 3](#), 1.

Headnote

1. With contracts of sale between a business and a consumer, which are formed within the framework of a so-called internet auction through offer and acceptance according to §§ 145 et seq. BGB and not through the falling of the hammer according to § 156 BGB (Bürgerliches Gesetzbuch – German Civil Code), the consumer has a right of withdrawal according to §§ 312d, 355 BGB.

Facts

The claimant deals in gold and silver jewellery as a business. On 07.08.2002 he placed a “15 ct. Diamond bracelet from 1 Euro” on the website of eBay International AG for auction and set a duration for the internet auction of one week. On 14.9.2002 the respondent submitted the highest bid of 252.51 Euros, but refused delivery and payment of the bracelet. The claimant seeks payment plus 11 Euros postage costs, in total 263.51 Euros plus interest. The Amtsgericht (= equivalent in this sense to small claims court) dismissed the claim and gave leave to appeal, the Landgericht (district court, in this sense also appellate court) dismissed the appeal. The subsequent Revision (appeal on points of law) was unsuccessful.

Legal issue

It is not disputed that a contract of sale for the bracelet arose between the parties on 14.09.2002 within the context of an internet auction. The contract of sale concluded online between the claimant as business (§ 14 (1) BGB) and the respondent as consumer (§ 13 BGB) represents a distance contract within the meaning of § 312d (1) BGB. Also it is not disputed that the respondent declared his withdrawal within the time limit specified in § 312d (1) BGB.

Neither is the right of withdrawal excluded – as stated by the BGH in its judgment – according to § 312d (4) No. 5 BGB. According to this provision the right of withdrawal does not exist, in the absence of any other rule, in distance contracts which were concluded in the form of auctions (§ 156 BGB). However, such a contract is not present in this case. An auction is characterised by the fact that the contract is concluded with the falling of the auctioneer’s hammer.

There is no such falling of the hammer with an internet auction however. Rather, the contract here is formed exclusively by declarations of legal intent by the parties – offer and acceptance – according to §§ 145 et seq. BGB. By placing the “15 ct. Diamond Bracelet from 1 Euro” up for auction on the eBay website and starting the internet auction, he gave a binding offer, directed to whomever gives the highest bid within the duration of the auction. This was the respondent, who accepted the claimant’s offer by his bid. The substance of the declaration accorded with the corresponding general conditions of business of eBay, which do not foresee a falling of the hammer.

Neither can one assume the existence of an auction according to § 156 BGB, according to the BGH, by a “falling of the hammer upon expiry of the duration of the auction”. The mere expiry of the duration of the auction is not a declaration of legal intent and neither can it be a substitute for one. By determining the duration of the internet auction the claimant set a time limit according to § 148 BGB for the acceptance of his offer by the highest bidder. The binding nature of the contract is not based upon the expiry of this time limit, but rather upon the declarations of legal intent – validly given within the duration of the auction. The fact that the offer was directed to the highest bidder - who would ultimately become the offeror’s contractual partner - and thereby was only established at the end of the auction, does not affect its validity.

It follows from an interpretation of § 312d (4) No. 5 BGB, according to the BGH, that the norm covers only those auctions in which the distance contract was formed by the falling of the hammer according to § 156 BGB. The BGH rejected a corresponding application to alternative forms of auction. This is due to the express reference to § 156 BGB and the formulation that the distance contract must have been concluded “in the form of” auctions according to § 156 BGB. Furthermore, § 312d (4) No. 5 BGB is an exceptional rule, which restricts the rights of the consumer and is therefore to be applied restrictively.

The regulation of the withdrawal right in § 312d BGB originates in Article 6 of the Distance Selling Directive 97/7/EC. Its purpose is to protect the consumer from the danger of a wrong decision to buy, which arises from the fact that in distance contracts the consumer regularly does not have the possibility to see the product prior to conclusion of the contract or to be informed of its qualities face to face (cf. recital no. 14 of the directive). Admittedly, the Distance Selling Directive itself does not apply to contracts “concluded at an auction”, according to Art. 3 (1), and it does not contain a more precise definition of the notion of auction. Nevertheless, it does not follow, that internet auctions as well as traditional auctions are also to be excluded from the scope of application of the Directive. The fact that the internet was already widely used at the time the Directive was conceived but was nevertheless not listed in the examples of distance communication technologies in Annex I to the Directive militates against such a view. Apart from that, one cannot derive an extended interpretation of § 312d (4) No. 5 BGB from the Directive to the effect that the present internet auction is to be regarded as an auction within the meaning of the Directive, because Member States are allowed, according to Art. 14 (1) of the Directive, to enact or retain measures more protective of the consumer to secure a higher level of consumer protection.

Further factors against an extended interpretation of § 312d (4) No. 5 BGB, in the view of the court, are the protective purpose of the right of withdrawal and a balance of the competing interests. In the context of internet auctions the consumer is exposed to the typical risks associated with forms of distance marketing, as he cannot view the product prior to conclusion of the contract. Finally, Art. 6 (5) of eBay’s general conditions of business also oblige the business to inform of statutory withdrawal rights.

Decision

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