

Case law

Case Details

National ID: XI ZR 351/97

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 07/07/1998

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Unfair Contract Terms Directive, [Article 2](#) Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [Article 3, 2.](#) Unfair Contract Terms Directive, [Article 4, 2.](#)

Headnote

1. A clause for the calculation of a special remuneration for the issue of a savings account book without cancellation is, according to § 8 AGBG (Allgemeine Geschäftsbedingungsgesetz – Standard Contract Terms Act) excluded from monitoring for compliance with the requirements of §§ 9 to 11 AGBG, as it concerns a special service.

Facts

The applicant consumer protection association has, according to its charter, the task of pursuing the interests of consumers through explanation and advice. The respondent Sparkasse (German trustee savings bank of public law) uses standard terms against its customers with reference to a tariff list. Under the heading "savings deposits fees" its terms and conditions contain the following clause: "Issue of a savings account book without cancellation according to § 7 NdsSpVO: 5 DM per 100 DM or part thereof credit balance, maximum 150 DM, minimum 15 DM." In the procedure according to § 13 AGBG (now § 1 UKlaG – Unterlassungsklagegesetz – Prohibitory Injunction Act) the applicant seeks an injunction prohibiting the respondent from further use of this remuneration clause.

The LG (Landgericht – district court) and the OLG (court to which appeals on points of fact and law are made) dismissed the application. The claimant subsequently appealed to the BGH (Bundesgerichtshof – Federal Supreme Court). The appeal was unsuccessful.

Legal issue

The BGH stated that the clause on calculation of special fees for the issue of a savings account book without cancellation is, in contrast to the view of the OLG, according to § 8 AGBG (now § 307 (3) BGB (Bürgerliches Gesetzbuch – German Civil Code)) not subject to monitoring for compliance with the requirements of §§ 9 to 11 AGBG (now §§ 307 – 309 BGB). As it concerned a special service, the determination of the fee to be paid by the customer in the general terms and conditions is therefore not subject to review.

The BGH argued that the issue of a new savings account book without cancellation is not a duty incumbent upon Sparkassen according to §§ 368 et seq. BGB, such as the issue of a receipt, for which they are not allowed to require payment. The savings account book is a qualified legitimation paper and therefore not comparable with a receipt within the meaning of § 368 BGB. Furthermore, it does not concern – in contrast to § 369 BGB – the costs of first issue, but rather the cost for the re-issue of a lost document.

Furthermore, the protective purpose of § 8 AGBG does not permit an extension of the monitoring of contractual content beyond that prescribed in the wording of the provision on special services. The present case does not concern a case where the agreed price of the satisfied framework of the main service is increased by additional fees, or which indirectly increases the agreed price. The monitoring of clauses which alter the legal situation in favour of the user which § 8 AGBG aims to secure does not enable a judicial review of clauses for genuine supplementary services.

The BGH furthermore declined to refer the matter to the ECJ. Deciding on the question of whether the clause at issue is subject to review according to §§ 9 to 11 AGBG is a matter for the German courts, over which the ECJ has no jurisdiction according to Art. 177 (now 234) EC.

Decision

Full text: [Full text](#)

Related Cases

No results available

Legal Literature

No results available

Result