

## Case law

### Case Details

**National ID:** 1 Ob 46/03a

**Member State:** Austria

**Common Name:** link

**Decision type:** Other

**Decision date:** 10/02/2004

**Court:** Oberster Gerichtshof (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 4, 1.](#) Unfair Contract Terms Directive, [Article 5](#) Unfair Contract Terms Directive, [Article 7](#)

### Headnote

1. Class action proceedings as laid down in §§ 28 and 29 KSchG should make it possible to control the content of STCs or pro forma contracts as a precautionary measure. This is designed to prevent from the outset the use of inappropriate contract clauses.
2. Contract clauses are thus not to be used if they are generally not permissible, ie impact on a large number of cases.
3. If this is the case, then, in a class action lawsuit, the facts of the case should be interpreted assuming the worst case scenario for the consumer. And, with this in mind, there should be an assessment of whether there is a breach of a legal interdiction or an infringement of good moral practice.
4. An injunction is equally justified when the disputed clause is only partially unacceptable. This is because in class action proceedings, there is no possibility of reducing the scope of the clause.
5. Any contract clause, in which a consumer pledges to transfer his salary or wage entitlements, yet where the formulation of the clause is such that – especially for an individual who is not well versed in law – it is not clear whether these are to be transferred to a specific debt collection agency or rather a client of the agency, contravenes the transparency requirement laid down in § 6 para 3 KSchG and is thus invalid.

### Facts

a) "I agree that accessoriness is annulled herewith. This means that debt recovery costs that can be regarded as pre-trial costs are not included in the listed trial costs. Rather, provided that they are necessary for prosecution, these can be sued for."

b) "I wish to avoid legal proceedings. As such, in order to secure the outstanding monies outlined above, I transfer to you my salary and wage entitlements from my current employer. This is on the basis of an agreement on the rates to be paid, with effect from the settlement date and up to the value of the outstanding monies mentioned above."

The Austrian Consumers' Association filed a class action as per §§ 28 ff KSchG, requesting an injunction that ordered the debt collection agency to desist from using in its contracts with consumers the aforementioned two clauses (as well as any potential equivalent clauses) in its STCs and not to apply the clauses should they already be included unacceptably in existing contracts. At the same time, it requested that the judgement be made public. The Association argued that the first clause was a) not transparent as per § 6 para 3 KSchG and b) "grossly discriminatory" as per § 879 para 3 ABGB. It also argued that the second clause contained an unacceptable transferral of future payments as per § 12 para 1 KSchG and that there was a clear attempt to circumvent the intended purpose of this provision. Moreover, the clause was "grossly discriminatory" under § 879 para 3 ABGB.

The debt collection agency (the defendant) objected primarily on the basis that the first clause was in line with the new amendment to the law governing interest rates, which had entered into force on 1st August 2002, and should therefore be permissible.

The Court of First Instance upheld the claim. The Court of Appeal revised the verdict, imposing the injunction on the defendant in terms of using or applying the first clause, but rejecting the request to apply it to the second clause as well.

### Legal issue

With regard to the first clause, the OGH clarified the existing legal situation in the wake of the amendment to the law governing interest rates. It concluded that, with the new law that applied in this instance, suing independently for additional monies where there was a more substantial outstanding principal debt could have cost implications, but was not enough to reject (even partially) the claim. However, the second clause had been rendered invalid, especially since interpreting it from a "worst case scenario for the consumer" perspective did not suggest that the debtor was liable to reimburse the agency's costs. This meant that, in reality, the debtor was not in a worse position for having agreed to the second clause than he would have been had he not done so.

### Decision

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### Related Cases

No results available

### Legal Literature

No results available

### Result