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Case law

Case Details

National ID: 5 Ob 227/98p

Member State: Austria

Common Name:link

Decision type: Other

Decision date: 09/03/1999

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 7

Headnote

1. Any agreement on prosecution costs to be borne in the future that neither indicates the likely value of the costs, nor stipulates that only costs that are necessary for the firm to prosecute or collect outstanding monies are to be reimbursed, is grossly discriminatory as per § 879 para 3 ABGB. This is because the consumer could be liable to pay other unrelated supplier costs.

2. In class action proceedings, it is necessary to check the wording of a specific contract term and to impose an interdiction (as laid down in § 28 para 1 KSchG) on the defendant to prevent the use of these illegal or improper clauses. To ensure that the interdiction cannot be easily circumvented, it is imperative to extend it to the use of equivalent clauses, ie to those with the same unacceptable purpose.

3. The second sentence of § 28 para 1 KSchG makes it clear that a supplier who is required to desist from using specific clauses may not then refer to the unacceptable clauses in individual cases. The restriction “insofar as they have been unacceptably agreed” takes into account the fact that in class action lawsuits, there is no intention to reduce the scope of a clause, which could then, in assessing the agreement of a clause in a specific individual case, lead to its being regarded as permissible.

Facts

In view of this course of action, the Austrian Consumers’ Association brought a class action against the defendant. Its claim essentially mirrored the request outlined down. In legal terms, the Association argued that the first clause contravened § 6 para 3 KSchG and § 879 para 3 ABGB, and the second § 13 KSchG. Furthermore, it held that there was a danger of repetition – a prerequisite for demanding an injunction – since although the defendant had agreed to make a pledge, secured against a penalty, to cease using such clauses, her decision to insert a rider made this inadequate. Moreover, the defendant had not committed to avoiding the use of equivalent clauses, which was necessary, especially as she might otherwise be able to circumvent the interidction by reformulating the clauses. Thus, overall, the danger of repetition had not been removed. The defendant applied for the case to be dismissed.

The Court of First Instance upheld the claim in its entirety. The Court of Appeal, on the other hand, in part upheld the defendant’s appeal. It rejected the Association’s request for an injunction ordering that the defendant desist from invoking the two clauses insofar as they formed the basis of contracts that had already been concluded with consumers. The court held that the plaintiff’s request was not in line with the wording of § 28 para 1 sentence 2 KSchG, which stipulates as a prerequisite the fact that a contract term “has been unacceptably agreed”. The plaintiff was also seeking to prevent the defendant from using contract terms that had been acceptably agreed. For the rest, the Court of Appeal concurred with the ruling of the Court of First Instance. Both parties appealed to the Supreme Court.

Legal issue

With regard to the second clause, the OGH merely emphasised that it was incontrovertibly in breach of the legal interdiction in § 13 KSchG.

On the question of whether there was a danger of repetition, the OGH held that, under § 28 para 2 KSchG, there was no longer such a danger if the defendant has made a pledge, secured against a penalty, to desist from such activities. However, this would require the defendant to submit fully to the demands of the consumer body. Appending a term or restriction to this pledge – as the defendant did in the case of the first clause – would mean that the danger of repetition remained. This is because it would still depend on the defendant’s own standpoint, which affords inadequate protection against a repeat infringement. The OGH also explored the question of whether, in terms of assessing the danger of repetition, the defendant’s refusal to pledge to desist from the use of “equivalent clauses” overrode the other pledge to desist that she made. It supported this view (see headnote 2).

The OGH rejected the defendant’s appeal for the reasons cited above. With regard to the Austrian Consumers’ Association, the OGH examined, inter alia, what the Court of Appeal had adjudged to be the plaintiff’s misinterpretation of the wording in § 28 para 1 sentence 2 KSchG, concurring in essence with the Court of Appeal’s finding (headnote 3). However, there was a proviso. Unlike the Court of Appeal, which assumed an “aliud”, the OGH upheld the claim and found that the defendant should desist from applying the two clauses where these had been unacceptably agreed in contracts that had already been concluded with consumers.

Decision

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