

Case Details

Case Details

National ID	no. 14669/2003
Member State	Italy
Common Name	Abrescia v. Soc. Consultur
Decision type	Other
Decision date	01/10/2003
Court	Corte di cassazione (Supreme court)
Subject	
Plaintiff	
Defendant	
Keywords	

Directive Articles

Unfair Contract Terms Directive, [ANNEX I, 1.](#)

Headnote

1. The provision at Art. 1469 bis paragraph 3, n. 19 c.c. must be interpreted as exclusive jurisdiction in consumer contracts, with the presumption of unfairness of the clauses establishing that the competent judge is not the one of the place where the consumer is resident or domiciled. However that provision is of procedural law and consequently it must be applied to the controversies started after its implementation, even if depending from contracts concluded before that. Moreover, Art. 1469 bis, paragraph 3, c.c. must be applied in event of clauses reproducing provisions of law, such as Art. 18, Art. 19, Art. 20 of Italian Code of Civil Procedure.

Facts

Chiara Abrescia and the company Consultur S.r.l. concluded a preliminary contract for the sale of timeshare property of an apartment complex in Comune di Mezzana.

The preliminary contract was concluded in Altamura, place of residence of Chiara Abrescia and away from the business premises of Consultur. In such a contract there was the clause 11, approved in written form by Chiara Abrescia, of the exclusive jurisdiction in the forum of Milano.

Chiara Abrescia sued Consultur S.r.l. before the Tribunale di Bari, sezione distaccata di Altamura for the reimbursement of part of the payment made in conformity with the clause 7 of contract. The reason of her claim for the reimbursement was the request of other payments than those agreed for the conclusion of the definitive contract. The Tribunale di Bari, on the basis of the request of the defendant, declared its incompetence and declared the competence of the Tribunale di Milano.

Chiara Abrescia has brought an action before the Corte di cassazione asking the judges to determine the competence (i.e. regolamento di competenza”).

Considering that issue rather problematic for several inconsistent decisions of different divisions of the Supreme Court, the Corte di Cassazione has decided in Sezioni Unite.

Legal issue

The Corte di Cassazione Sezioni Unite clarified the interpretative contrast as follows:

1. The Art. 12 (exclusive jurisdiction) of Legislative Decree 15/01/1992, no. 50 implementing Directive 85/577/EEC

cannot be applied because the subject matter of the contract is not within the scope of that measure and it is not proven that other additional services of higher amount had been agreed (ECJ. (C-423-97), 22/04/1999)

2. The Art. 10 (exclusive jurisdiction) of Legislative Decree 9/11/1998, no. 427 implementing Directive 94/47/EC cannot be applied to the contracts concluded before its implementation because such an article is relating to the substantive law of that Decree and it is not a procedural norm.

3. Legislative Decree no. 52 of 1996 implementing Directive 93/13/EC at Art. 1469 bis paragraph 3, n. 19 c.c. introduced a rule whose nature several decisions of the Supreme Court discussed the interpretation. One series of decisions interpreted that provision as a norm of substantive law and therefore not to be applied to the controversies relating to contracts concluded before the implementation of that Decree (Cassazione 22/11/2000 no. 15101) Another interpretation supports that the provision at Art. 1469 bis paragraph 3, n. 19 c.c. gives a presumption of unfairness of the clause establishing a jurisdiction different from those of the judge where the consumer is resident or domiciled, but in any case the articles 18, 19 and 20 of the Italian Code of Civil Procedure relating to the general and alternative forum continue to be applied (Cassazione 24.07.2001, no. 10086). Other decisions interpreted Art. 1469 bis paragraph 3, n. 19 c.c. as a new rule on jurisdiction in the event of controversies relating to consumer contracts (Cassazione 28/08/2001 no. 11282)

According to Art. 5 of Italian Code of Civil Procedure, the latter interpretation must be considered effective, since the jurisdiction and competence are determined on the basis of law in force and of the circumstances of fact present at the moment of the judicial claim. And the law determining the jurisdiction and the competence establishes also the possibility or not for the parties to derogate to the jurisdiction and the rules on the validity of such a derogation, as the Art. 1469 bis paragraph 3, n. 19 c.c. states.

In consequence of that, Art. 1469 bis paragraph 3, n. 19 c.c. must be interpreted as a provision of procedural law providing exclusive jurisdiction in consumer contracts and consequently it must be applied to the controversies started after its implementation, even if depending from contracts concluded before it.

Decision

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