

Case law

Case Details

National ID: 99A796

Member State: Portugal

Common Name: link

Decision type: Other

Decision date: 23/11/1999

Court: Supremo Tribunal de Justiça (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

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

Headnote

A term in a contract for the use of a debit card that allows either party to terminate a contract provided that three days' notice is given to the other party is unfair and unlawful under article 22, no. 1, indent b) of Decree 446/85 of 25 August (Decree 220/95 of 31 January) on the grounds that a three-day notice period is inadequate.

Facts

The Public Ministry brought a case in which the court was asked to rule on the validity of a number of terms in a contract for the issuing and use of debit cards (ATM/TPA Multibanco, ATM/TPA Electron, Eurocheque). These contracts were concluded between a commercial enterprise (active in the banking sector) and a consumer without any preliminary negotiation: the contract terms (standard terms and conditions) had already been put in writing and the consumer simply had to agree to them.

The validity of the following terms was under examination:

- a) Term 7 in the standard terms and conditions, stipulating that when the cardholder proves fraud, theft or forgery of his card, he is liable for any damages incurred as a result of misuse of his card until he notifies the issuer, up to a certain value (150 ECU in the event).
- b) Term 17 in the standard terms and conditions, stipulating that failure to fulfil the obligations laid down in the standard terms and conditions provides reasonable grounds for terminating the contract with immediate effect.
- c) Term 18 in the standard terms and conditions, stipulating that either of the parties was entitled to terminate the contract provided that they give the other party a minimum of three days' notice in writing.

Legal issue

Having considered the question of whether a contract for the issuing and use of debit cards was independent of a bank account contract, the court ruled that this case was covered by national legislation governing standard terms and conditions in a contract. The question of whether the terms were unfair would be answered on the basis of the provisions in Decree 446/85 of 25 August (amended by Decree 220/95 of 31 January).

The validity of term 7 was questioned on the basis of the provisions in article 21 (indent (f)) on terms that are completely unlawful. This states that terms that alter the rules with regard to risk distribution are completely unlawful. The court ruled that this term did not impact negatively on bona fides (good faith) because there was an equitable share of the damages over time between the banking institution and the consumer. Once the consumer had notified the bank of fraud, theft or forgery of the card, the damages could no longer be attributed to a negligent attitude on the part of the cardholder. Rather, at this juncture, liability for the damages incurred as a result of the card's misuse shifted to the banking institution, which would not incur any further damages provided that it took appropriate measures. In support of its ruling, the court also referred to comparative law, as well as European Commission Recommendation 97/489/EC.

The court also ruled that term 17 was not in any way invalid. This did not constitute unrestricted termination of the contract (as is banned under article 22 no. 1, indent b)); rather it was dependent on non-compliance with the legal provisions or the terms of the contract.

The court ruled that term 18 was null and void on the grounds that it was in breach of article 22 no. 1 indent b), which bans unrestricted termination of a contract without providing adequate notice. The court adjudged the three-day period to be insufficient for the consumer where the banking institution exercised its right of termination. Indeed, it was not possible for the consumer to acquire a new debit card in a 3-day period. Moreover, doing so would require opening a new bank account in a different banking institution, which would in turn need to gather information on the consumer applying for the card.

Decision

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