

## Case law

### Case Details

**National ID:** XI ZR 167/96

**Member State:** Germany

**Common Name:** link

**Decision type:** Other

**Decision date:** 14/10/1997

**Court:** BGH (Supreme court)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

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

### Headnote

1. A clause on the calculation of special fees for the use of credit cards abroad cannot, according to § 8 AGBG (Allgemeine Geschäftsbedingungengesetz – Standard Contract Terms Act) (=Art. 4 (2) Directive 93/13/EC), be reviewed according to the standards of §§ 9 – 11 AGBG.

### Facts

The applicant is a consumer protection association. The respondent is a branch of Barclays bank (B-Bank) established in G. In the context of its business activity it issues inter alia credit cards and uses thereby general terms and conditions against its customers. No. 7 of these terms and conditions provides that the bank may calculate appropriate fees for the cession of cards, for the cash withdrawal service, for the use of cards abroad as well as other services relating to the card. Furthermore, the bank reserves the right to amend its fees at its equitable discretion (§ 315 BGB).

The applicant challenges this clause by means of injunctive application according to § 13 AGBG, in respect of the respondent calculating fees “for the use of cards abroad” and “for other services in relation to the card”.

The LG (Landgericht – district court) allowed the claim. Upon appeal by the respondent, the OLG (Oberlandesgericht – higher regional court) restricted the prohibition on use of terms and conditions to the rule on use of cards abroad and otherwise dismissed the claim. Both parties appealed against this judgment. The appeal of the respondent was successful, that of the claimant however was not.

### Legal issue

In contrast to the view of the OLG, the BGH (Bundesgerichtshof – BGH) is of the view that the clause on the calculation of special fees for the use of credit cards abroad is, according to § 8 AGBG, excluded from review according to the standard of §§ 9 to 11 AGBG.

The BGH regards as decisive the fact that the use abroad fee is, according to § 8 AGBG, a determination of price for the contractual service offered and therefore free from judicial control and not, as for example as with deposits and withdrawals at the cash desk, a performance of independent services. A judicial review of the question of whether differing fees for individual variants of the availing of a contractual service is necessary or appropriate in the economic sense exceeds the limits of permissible judicial price controls. It therefore does not depend on whether and to what extent the respondent does in fact accrue further costs for use of the card abroad either. Furthermore, the rule on fees also does not deviate from the essential rights and duties of the contract, which according to § 8 AGBG could justify review according to §§ 9 to 11 AGBG, as the customer would in any case expect to have to pay an additional fee for use of the card abroad.

In the view of the BGH, the clause at issue is also valid to the extent that it does not relate to fees for other services in relation to the card. The clause is of course capable of review according to § 8 AGBG, as it does not concern a main service owed by the respondent, but rather is a facultative additional service offered and is therefore to be regarded as an ancillary (price) agreement; however, it is, according to § 9 AGBG, not reviewable on the issue of transparency, because the services for which fees are required are named in the price directory and are thereby sufficiently clear and comprehensible. Neither is it a charter for the introduction of new reasons for requiring fees, because the written notice, the right of cancellation, and the requirement of reasonableness and also the binding to equitable discretion all afford sufficient protection.

### Decision

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